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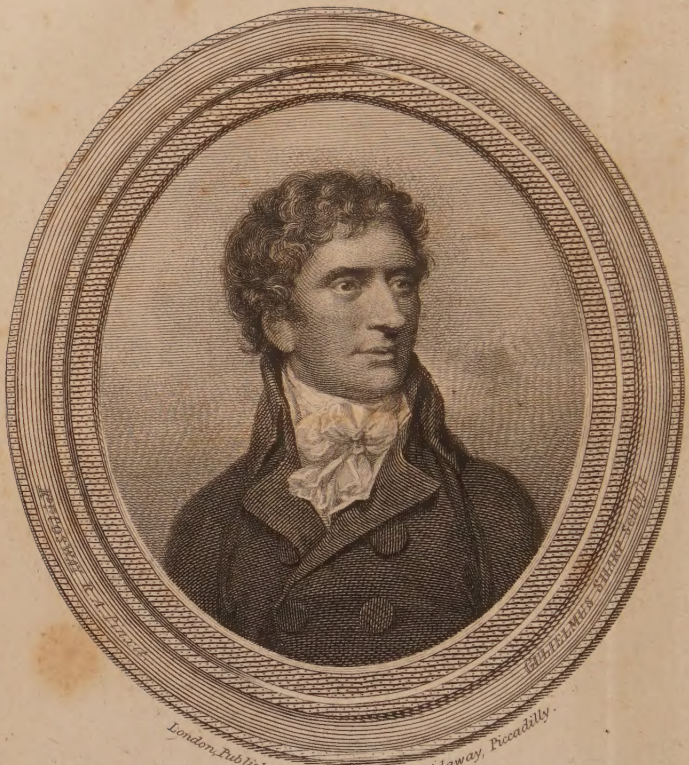

London, Published Nov.r 1st 1810, by J. Ridgway, Piccadilly.

The Hon.ble THO.s ERSKINE.

now

Lord Erskine

THE

SPEECHES

OF

THE HON. THOMAS ERSKINE

(NOW LORD ERSKINE),

WHEN AT THE BAR,

ON

No Front Cover

SUBJECTS

CONNECTED WITH

THE LIBERTY OF THE PRESS,

AND AGAINST

Constructive Treasons.

COLLECTED BY

JAMES RIDGWAY.

IN THREE VOLUMES.

VOL. I.

LONDON:

PRINTED FOR J. RIDGWAY,

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THE

EDITOR'S PREFACE.

On reading lately a collection of celebrated Speeches of the Master of the Rolls of Ireland, when at the bar in that country, where he so long maintained the highest reputation, the Editor was forcibly struck with the following passage in the Preface to the Second Edition, published at Dublin last year:

"*It is much to be regretted that Mr. Erskine's "Speeches, as an Advocate, have not been yet published "in a separate volume. They are only to be found "in printed reports of the trials in which he was en-"gaged; and from the difficulty which the Editor of "the present volume has experienced in collecting "those of Mr. Curran, it is probable that, in a few "years, to procure Mr. Erskine's Speeches will be "impossible.*"

This suggestion determined the Editor no longer to delay the publication of as many of the genuine

Speeches of Lord Erskine as he could collect, which he had long intended to do, and which indeed he had begun several years ago, but found difficulties in the way.

It is indeed surprising how very few of the real Speeches of eminent Counsel have been preserved. Many of the printed Trials in circulation are the abridged reports of persons not acquainted with short-hand writing, and contending besides for the earliest publication, on occasions interesting to the Public, and do not convey any idea of the eloquence of the English Bar, the monuments of which, more especially in cases connected with the constitution of the government and with public liberty, ought to be carefully preserved as part of the history and character of our country.

It is much to be regretted that English State Trials are so little known: they have hitherto been printed in folio, and are only to be found in the possession of lawyers, or in great libraries; whereas they ought to be universally circulated throughout the country, where the prudent assertion of invaluable privileges depends so much upon a perfect acquaintance with the principles on which they rest, and where the common classes of the people are called

upon daily to assist in the administration of criminal justice, in cases too where the stability and security of the government on the one hand, and the lives and liberties of the subject on the other, may depend upon an enlightened judgment. On this account we have seen, with much satisfaction, the progress of Mr. Cobbett's edition of the State Trials, now printing in octavo; which appear, from the notes, to be superintended with very great legal information and remark, and which we hope will in the end embrace all the important proceedings in our courts of criminal justice.

We cannot better illustrate what we have before observed, of the scarcity of genuine Trials, than by saying, that the Speeches of Lord Erskine, when at the Bar, which we now publish, together with another volume in the press, do not fill up the pleadings of THREE WEEKS, out of a life of nearly THIRTY YEARS incessant occupation in all our courts of justice throughout the kingdom.

We have taken the assistance of a Gentleman well acquainted with legal proceedings, to state the occasions on which the Speeches collected were delivered, with as much of the circumstance, and of the evidence upon the trials, as was thought necessary to illustrate the argument.

It was our original intention, in pursuing this course, to have printed only the Speeches of Lord Erskine, which it was our sole object to collect; but as we advanced to occasions very near our own times, we were desirous to avoid even the appearance of supporting or qualifying the foundations and merits of public prosecutions of a peculiar class; and in those cases, therefore, we have printed also the Speeches of the Advocates, which have indeed tended further to illustrate the arguments which it was our design to preserve.

In preparing the Prefaces to the Speeches, the Editor has carefully abstained from all observations upon their merits or character, wishing that every reader should be left to judge for himself, assisted as the Public now are by the many able and independent criticisms, which contribute so much to the advancement of learning in this island.

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The Honourable THOMAS ERSKINE's *First* SPEECH *in Westminster Hall, delivered in the Court of King's Bench, on the 24th of November*, 1778.

Taken in Short-hand and published, with the rest of the Proceedings, by Captain Baillie himself, in 1779.

THE SUBJECT.

CAPTAIN THOMAS BAILLIE, one of the oldest Captains in the British navy, having, in consideration of his age and services, been appointed Lieutenant Governor of the Royal Hospital for Superannuated Seamen at Greenwich, saw (or thought he saw) great abuses in the administration of the charity; and prompted, as he said, by compassion for the seamen, as well as by a sense of public duty, had endeavoured by various means to effectuate a reform.

In pursuance of this object, he had at various times presented petitions and remonstrances to the Council of the Hospital, the Directors, and the Lords Commissioners of the Admiralty; and he had at last recourse to a printed appeal, addressed to the General Governors of the Hospital. These Governors consisted of

all the great Officers of State, Privy Counsellors, Judges, Flag-Officers, &c. &c.

Some of the alleged grievances in this publication were, that the health and comfort of the seamen in the Hospital were sacrificed to lucrative and corrupt contracts, under which the clothing, provisions, and all sorts of necessaries and stores were deficient; that the contractors themselves presided in the very offices, appointed by the charter for the control of contracts, where, in the character of counsellors, they were enabled to dismiss all complaints, and carry on with impunity their own system of fraud and peculation.

But the chief subject of complaint (the public notice of which, as Captain Baillie alleged, drew down upon him the resentment of the Board of Admiralty) was, that LANDMEN *were admitted into the offices and places in the Hospital, designed exclusively for* SEAMEN, *by the spirit, if not by the letter of the institution. To these landmen Captain Baillie imputed all the abuses he complained of, and he more than insinuated by his different petitions, and by the publication in question, that they were introduced to these offices for their election services to the Earl of ———, as freeholders of Huntingdonshire.*

He alleged further, that he had appealed from time to time to the Council of the Hospital, and to the Directors, without effect; and that he had been equally unsuccessful with the Lords Commissioners of the Admiralty, during the presidency of the Earl of Sandwich; that, in consequence of these failures, he re-

solved to attract the notice of the General Governors, and, as he thought them too numerous as a body, for a convenient examination in the first instance, and besides, had no means of assembling them, a statement of the facts through the medium of this Appeal, drawn up exclusively for their use, and distributed solely among the members of their body, appeared to him the most eligible mode of obtaining redress on the subject.

*In this composition, which was written with great zeal and with some asperity *, the names of the landmen, intruded into the offices for seamen, were enumerated; the contractors also were held forth and reprobated; and the First Lord of the Admiralty himself was not spared.*

On the circulation of the book becoming general, the Board of Admiralty suspended Captain Baillie from his office. And the different officers, contractors, &c. in the Hospital, who were animadverted upon, applied to the Court of King's Bench, in Trinity Term, 1778, and obtained a rule upon Captain Baillie to show cause in the Michaelmas Term following, why an information should not be exhibited against him for a libel.

All Captain Baillie's leading Counsel having spoken on the 23d of November, and, owing to the lateness of the hour, the Court having adjourned the argu-

* The foundation for it we do not mean to enter into, the Editor being a stranger to all the circumstances, and the preface being only introduced as explanatory of the Speech.

ment till the morning of the 24th, Mr. Erskine spoke as follows, from the back row of the Court, we believe for the first time, as he had only been called to the bar on the last day of the Term preceding.

THE HONOURABLE

MR. ERSKINE'S SPEECH

FOR

CAPTAIN BAILLIE,

In the Court of King's Bench,

NOVEMBER 24, 1778.

MY LORD,

I AM likewise of counsel for the author of this supposed libel; and if the matter for consideration had been merely a question of private wrong, in which the interests of society were no farther concerned, than in the protection of the innocent, I should have thought myself well justified, after the very able defence made by the learned gentlemen who have spoken before me, in sparing your Lordship, already fatigued with the subject, and in leaving my Client to the prosecutor's Counsel and the judgment of the Court.

But upon an occasion of this serious and dangerous complexion, when a British subject is brought before a court of justice only for having ventured to attack abuses, which owe their continuance to the

danger of attacking them; when, without any motives but benevolence, justice, and public spirit, he has ventured to attack them though supported by power, and in that department too, where it was the duty of his office to detect and expose them; I cannot relinquish the high privilege of defending such a character;—I will not give up even my small share of the honour of repelling and of exposing so odious a prosecution.

No man, my Lord, respects more than I do the authority of the laws, and I trust I shall not let fall a single word to weaken the ground I mean to tread, by advancing propositions, which shall oppose or even evade the strictest rules laid down by the Court in questions of this nature.

Indeed, it would be as unnecessary as it would be indecent; it will be sufficient for me to call your Lordship's attention to the marked and striking difference between the writing before you, and I may venture to say almost every other, that has been the subject of argument on a Rule for a criminal Information.

The writings or publications, which have been brought before this Court, or before Grand Juries, as libels on individuals, have been attacks on the characters of private men, by writers stimulated sometimes by resentment, sometimes, perhaps, by a mistaken zeal; or they have been severe and unfounded strictures on the *characters* of public men, proceeding from officious persons taking upon themselves

the censorial office, without temperance or due information, and without any call of duty to examine into the particular department, of which they choose to become the voluntary guardians :—a guardianship which they generally content themselves with holding in a newspaper for two or three posts, and then, with a generosity which shines on all mankind alike, correct every department of the state, and find at the end of their lucubrations, that they themselves are the only honest men in the community.—When men of this description suffer, however we may be occasionally sorry for their misdirected zeal, it is impossible to argue against the law that censures them.

But I beseech your Lordship to compare these men and their works, with my Client, and the publication before the Court.

Who is he?—What is his duty?—What has he written?—To whom has he written?—And what motive induced him to write?

He is Lieutenant Governor of the Royal Hospital of Greenwich, a palace built for the reception of aged and disabled men, who have maintained the empire of England on the seas, and into the offices and emoluments of which, by the express words of the Charter, as well as by the evident spirit of the institution, no Landmen are to be admitted.

His Duty—in the treble capacity of Lieutenant Governor, Director, and a general Governor, is, in conjunction with others, to watch over the internal

economy of this sacred charity, to see that the setting days of these brave and godlike men are spent in comfort and peace, and that the ample revenues, appropriated by this generous nation to their support, are not perverted and misapplied.

HE HAS WRITTEN, that this benevolent and politic institution has degenerated from the system established by its wise and munificent founders;—that its Governors consist indeed of a great number of illustrious names and reverend characters, but whose different labours and destinations in the most important offices of civil life rendered a deputation indispensably necessary for the ordinary Government of the Hospital;—that the difficulty of convening this splendid corporation had gradually brought the management of its affairs more particularly under the direction of the Admiralty;—that a new Charter has been surreptitiously obtained, in repugnance to the original institution, which enlarges and confirms that dependence;—that the present First Lord of the Admiralty (who, for reasons sufficiently obvious, does not appear publicly in this prosecution) has, to serve the base and worthless purposes of corruption, introduced his prostituted freeholders of Huntingdon into places destined for the honest freeholders of the seas;—that these men (among whom are the prosecutors) are not only Landmen, in defiance of the Charter, and wholly dependent on the Admiralty in their views and situations, but, to the reproach of all order and government, are suffered to act as Direc-

tors and Officers of Greenwich, while *they themselves* hold the very subordinate offices, the *control* of which is the object of that direction;—and inferring from thence (as a general proposition) that men in such situations cannot, as human nature is constituted, act with that freedom and singleness which their duty requires, he justly attributes to these causes the grievances which his gallant brethren actually suffer, and which are the generous subject of his complaint.

He has written this, my Lord, not *to the public at large*, which has no jurisdiction to reform the abuses he complains of, but to *those only* whose express duty it is to hear and to correct them, and I trust they will be solemnly heard and corrected.—He has not PUBLISHED, but only distributed his book among the Governors, to produce inquiry and not to calumniate.

THE MOTIVE WHICH INDUCED HIM TO WRITE, and to which I shall by and by claim the more particular attention of the Court, was to produce reformation;—a reformation which it was his most pointed duty to attempt, which he has laboured with the most indefatigable zeal to accomplish, and against which every other channel was blocked up.

My Lord, I will point to the proof of all this: I will show your Lordship that it was his duty to investigate;—that the abuses he has investigated do really exist, and arise from the ascribed causes;—that he has presented them to a competent jurisdiction,

and not to the public;—and that he was under the indispensable necessity of taking the step he has done to save Greenwich Hospital from ruin.

Your Lordship will observe, by this subdivision, that I do not wish to form a specious desultory defence: because, feeling that every link of such subdivision will in the investigation produce both law and fact in my favour, I have spread the subject open before the eye of the Court, and invite the strictest scrutiny. Your Lordship will likewise observe by this arrangement, that I mean to confine myself to the *general* lines of his defence; the various affidavits have already been so ably and judiciously commented on by my learned leaders, to whom I am sure Captain Baillie must ever feel himself under the highest obligations, that my duty has become narrowed to the province of throwing his defence within the closest compass, that it may leave a distinct and decided impression.

And first, my Lord, as to its being his *particular duty* to inquire into the different matters which are the subject of his publication, and of the prosecutors' complaint: I believe, my Lords, I need say little on this head to convince your Lordships, who are yourselves Governors of Greenwich Hospital, that the defendant, in the double capacity of Lieutenant Governor and Director, is most indispensably bound to superintend every thing that can affect the prosperity of the institution, either in internal economy, or appropriation of revenue; but I cannot help reading two

copies of letters from the Admiralty in the year 1742;—I read them from the publication, because their authenticity is sworn to by the defendant in his affidavit;—and I read them to show the sense of that Board with regard to the right of inquiry and complaint in all officers of the Hospital, even in the departments not allotted to them by their commissions.

"*To Sir John Jennings, Governor of Greenwich Hospital.*

"SIR, Admiralty Office, April 19, 1742.

"The Directors of Greenwich Hospital having "acquainted my Lords Commissioners of the Ad- "miralty, upon complaint made to them that the "men have been defrauded of part of their just "allowance of broth and pease-soup, by the small- "ness of the pewter dishes, which in their opinion "have been artificially beaten flat, and that there "are other frauds and abuses attending this "affair, to the prejudice of the poor men; I am "commanded by their Lordships to desire you to "call the Officers together in Council, and to let "them know, that their Lordships think them very "blameable for suffering such abuses to be practised, "which could not have been done without their "extreme indolence in not looking into the affairs "of the Hospital: that their own establishment in

" the Hospital is for the care and protection of the " poor men, and that it is their duty to look daily " into every thing, and to remedy every disorder; " and not to discharge themselves by throwing it " upon the under Officers and Servants, and that " their Lordships being determined to go to the " bottom of this complaint, do charge them to find " out and inform them at whose door the fraud " ought to be laid, that their Lordships may give " such directions herein as they shall judge proper.

" I am, Sir,

" Your most obedient servant,

" THO. CORBET."

" Sir, Admiralty Office, May 7th, 1742.

" My Lords Commissioners of the Admiralty " having referred to the Directors of Greenwich " Hospital the Report made by yourself and Officers of " the said Hospital in Council, dated the 23d past, " relating to the flatness of the pewter dishes made " use of to hold the broth and pease-pottage served " out to the Pensioners; the said Directors have re- " turned hither a reply, a copy of which I am or- " dered to send you enclosed: they have herein set " forth a fact which has a very fraudulent appear- " ance, and it imports little by what means the " dishes became shallow: but if it be true, what " they assert, that the dishes hold but little more " than half the quantity they ought to do, the poor " men must have been greatly injured; and the al-

" legations in the Officers' Report, that the Pen-
" sioners have made no complaint, does rather ag-
" gravate their conduct, in suffering the men's pa-
" tience to be so long imposed upon.

" My Lords Commissioners of the Admiralty do
" command me, to express myself in such a manner
" as may show their wrath and displeasure at such
" a proceeding. You will please to communicate
" this to the Officers of the House in Council.

" Their Lordships do very well know that the
" Directors have no power but in the management
" of the revenue and estates of the Hospital, and
" in carrying on the works of the building, nor did
" they assume any on this occasion; but their Lord-
" ships shall always take well of them any in-
" formations, that tend to rectify any mistakes or
" omissions whatsoever, concerning the state of the
" Hospital.

" I am, Sir,

" Your obedient servant,

" THO. CORBET.

" *To Sir John Jennings,*

" *Governor of Greenwich Hospital.*"

From these passages it is plain, that the Admiralty *then* was sensible of the danger of abuses in so extensive an institution, that it encouraged complaints from all quarters, and instantly redressed them; for although Corruption was not then *an infant*, yet the idea of making a job of Greenwich

Hospital never entered her head; and indeed if it had, she could hardly have found at that time of day, a man with a heart callous enough to consent to such a scheme, or with forehead enough to carry it into public execution.

Secondly, my Lord, that the abuses he has investigated do in truth exist, and arise from the ascribed causes.

And, at the word TRUTH, I must pause a little to consider, how far it is a defence on a rule of this kind, and what evidence of the falsehood of the supposed libel the Court expects from prosecutors, before it will allow the information to be filed, even where no affidavits are produced by the defendant in his exculpation.

That a libel *upon an individual* is not the less so for being true, I do not, *under certain restrictions*, deny to be law; nor is it necessary for me to deny it, because this is not a complaint in THE ORDINARY COURSE OF LAW, but an application to the Court to exert an ECCENTRIC, EXTRAORDINARY, VOLUNTARY JURISDICTION, BEYOND THE ORDINARY COURSE OF JUSTICE;—a jurisdiction, which I am authorized from the best authority to say, this Court will not exercise, unless the prosecutors come PURE AND UNPOLLUTED; denying upon oath the truth of every word and sentence which they complain of as injurious: for although, in common cases, the matter may be not the less libellous, because true, yet the Court will not interfere by information, for guilty or

even equivocal characters, but will leave them to its ordinary process. If the Court does not see palpable MALICE and FALSEHOOD on the part of the defendant, and clear innocence on the part of the prosecutor, it will not stir;—it will say, This may be a Libel;—this may deserve punishment;—but go to a Grand Jury, or bring your actions:—all men are equally entitled to the protection of the laws, but all men are not equally entitled to an extraordinary interposition and protection, beyond the common distributive forms of justice.

This is the true constitutional doctrine of informations, and made a strong impression upon me, when delivered by your Lordship in this Court; the occasion which produced it was of little consequence, but the principle was important. It was an information moved for by General Plasto against the Printer of the Westminster Gazette, for a Libel published in his paper, charging that gentleman, among other things, with having been tried at the Old Bailey for a felony. The prosecutor's affidavit denied the charges *generally* as foul, scandalous, and false; but did not traverse the aspersion I have just mentioned, *as a substantive fact*; upon which your Lordship told the counsel *, who was too learned to argue against the objection, that the affidavit was defective in that particular, and should be amended before the Court would even grant a rule

* Mr. Dunning.

to show cause :—for although such GENERAL denial would be sufficient where the libellous matter consisted of scurrility, insinuation, GENERAL abuse, which is no otherwise traversable than by innuendos of the import of the scandal, and a denial of the truth of it, yet that when a Libel consisted of DIRECT AND POSITIVE FACTS AS CHARGES, the Court required SUBSTANTIVE *traverses of such facts* in the affidavit, before it would interpose to take the matter from the cognizance of a Grand Jury.

This is the law of informations, and by this touchstone I will try the Prosecutors' affidavits, to show that they will fall of themselves, even without that body of evidence, with which I can in a moment overwhelm them.

If the Defendant be guilty of any crime at all, it is for writing THIS BOOK: and the conclusion of his guilt or innocence must consequently depend on the scope and design of it, the general truth of it, and the necessity for writing it; and this conclusion can no otherwise be drawn, than by taking the WHOLE of it together. Your Lordships will not shut your eyes, as these Prosecutors expect, to the *design* and *general truth* of the book, and go entirely upon the *insulated* passages, culled out, and set heads and points in their wretched affidavits, without context, or even an attempt to unriddle or explain their sense, or bearing on the subject: for, my Lord, they have altogether omitted to traverse the scandalous facts themselves, and have only laid hold of those

warm animadversions, which the recital of them naturally produced in the mind of an honest, zealous man, and which, besides, are in many places only conclusions drawn from facts as general propositions, and not aspersions on them as individuals. And where the facts do come home to them AS CHARGES, *not one of them is denied by the Prosecutors. I assert, my Lord, that in the Directors' whole affidavit* (which I have read repeatedly, and with the greatest attention) *there is not any one fact mentioned by the Defendant, which is substantially denied*; and even when five or six strong and pointed charges are tacked to each other, to avoid meeting naked truth in the teeth, they are not even contradicted by the lump, but a general innuendo is pinned to them all; —a mere illusory averment, that the facts mean to criminate them, and that they are not criminal; BUT THE FACTS THEMSELVES REMAIN UNATTEMPTED AND UNTOUCHED.

Thus, my Lord, after reciting in their affidavit the charge of their shameful misconduct, in renewing the contract with the Huntingdon butchers, who had just compounded the penalties incurred by the breach of a former contract, and in that breach of contract, the breach of every principle of humanity, as well as of honesty;—and the charge of putting improper objects of charity into the Hospital, while the families of poor Pensioners were excluded and starving;—and of screening delinquents from inquiry and punishment *in a pointed and particular*

instance, and therefore traversable as a *substantive fact*; yet not only there is no such traverse, but, though all these matters are huddled together in a mass, there is not even a general denial; but one loose innuendo, that the facts in the publication are stated with an intention of criminating the Prosecutors, and that, *as far as they tend to criminate them*, they are false.

Will this meet the doctrine laid down by your Lordship in the case of General Plasto?—Who can tell what they mean by criminality?—Perhaps they think neglect of duty not criminal,—perhaps they think corrupt servility to a patron not criminal; and that if they do not ACTIVELY promote abuses, the winking at them is not criminal. But I appeal to the Court, whether the Directors' whole affidavit is not a cautious composition to avoid downright perjury, and yet a glaring absurdity on the face of it; for since the facts are not traversed, the Court must intend them to exist; and if they do exist, they cannot but be criminal. The very existence of such abuses, in itself criminates those, whose offices are to prevent them from existing. Under the shelter of such qualifications of guilt, no man in trust could ever be criminated. But at all events, my Lord, since they seem to think that the facts may exist without their criminality,—be it so: the Defendant then does not wish to criminate them; he wishes only for effectual inquiry and information, that there may be no longer any crimes, and consequently no criminality. But HE trusts, in the mean time, and

I likewise trust, that, while these facts do exist, the Court will at least desire the Prosecutors to clear themselves before the General Council of Governors, to whom the writing is addressed, and not before any *packed* Committee of Directors appointed by a noble Lord, and then come back to the Court acquitted of all criminality, or, according to the technical phrase, with *clean hands* for protection.

Such are the merits of the affidavits exhibited by the Directors; and the affidavits of the other persons are, without distinction, subject to the same observations. They are made up either of general propositions, converted into charges by ridiculous innuendos, or else of strings of distinct disjointed facts tied together, and explained by one general averment; and after all, the scandal, such as their arbitrary interpretation makes it, is still only denied with the old jesuitical qualification of criminality,—*the facts themselves remaining untraversed, and even untouched.*

They are, indeed, every way worthy of their authors;—of Mr. ——, the *good* steward, who, notwithstanding the remonstrances of the Captain of the week, received for the Pensioners such food as would be rejected by the idle vagrant poor, and endeavoured to tamper with the cook to conceal it;—and of Mr. ———, who converted their wards into apartments for himself, and the Clerks of Clerks, in the endless subordination of idleness;—a wretch, who has dared, with brutal inhumanity, to

strike those aged men, who in their youth would have blasted him with a look. As to Mr. —— and Mr. ——, though I think them reprehensible for joining in this prosecution, yet they are certainly respectable men, and not at all on a level with the rest, nor has the Defendant so reduced them. These two therefore have in fact no cause of complaint, and Heaven knows, the others have no title to complain.

In this enumeration of delinquents, the Rev. Mr. —— looks round, as if he thought I had forgotten him. He is mistaken;—I well remembered him: but *his* infamy is worn threadbare: Mr. Murphy has already treated him with that ridicule, which his folly, and Mr. Peckham with that invective, which his wickedness deserves. I shall therefore forbear to taint the ear of the Court further with his name;—a name which would bring dishonour upon his country and its religion, if human nature were not happily compelled to bear the greater part of the disgrace, and to share it amongst mankind.

But these observations, my Lord, are solely confined to the Prosecutors' affidavits, and would, I think, be fatal to them, even if they stood uncontroverted. But what will the Court say, when *ours* are opposed to them, where the truth of every part is sworn to by the Defendant?—What will the Court say to the collateral circumstances in support of them, where every material charge against the Prosecutors

is confirmed ?—What will it say to the affidavit that has been made, that no man can come safely to support this injured officer ?—that men have been deprived of their places, and exposed to beggary and ruin, merely for giving evidence of abuses, which have already by his exertions been proved before your Lordship at Guildhall, whilst he himself has been suspended as a beacon for prudence to stand aloof from, so that in this unconstitutional mode of trial, where the law will not lend its process to bring in truth by *force*, he might stand unprotected by the *voluntary* oaths of the only persons who could witness for him * ? His character has, indeed, in some measure, broke through all this malice: the love and veneration which his honest zeal has justly created, have enabled him to produce the proofs which are filed in Court ; but many have hung back, and one withdrew his affidavit, *avowedly* from the dread of persecution, even after it was sworn in Court. Surely, my Lord, this evidence of malice in the leading powers of the Hospital would alone be sufficient to destroy their testimony, even when swearing collaterally to facts, in which they were not themselves interested ;—how much more when they come as *prosecutors*, stimulated by resentment, and

* On the trial of a cause, every person acquainted with any fact is bound, under pain of fine and imprisonment, to attend on a subpœna to give evidence before the Court and Jury ; but there is no process to compel any man to make an affidavit before the Court.

with the hope of covering their patron's misdemeanors and their own, by turning the tables on the Defendant, and prosecuting *him* criminally, to stifle all necessary inquiry into the subject of his complaints?

Lieutenant Gordon, the first Lieutenant of the Hospital, and the oldest officer in the navy; Lieutenant William Lefevre; Lieutenant Charles Lefevre, his son; Alexander Moore; Lieutenant William Ansell; and Captain Allright, have all positively sworn, that a faction of Landmen subsists in the Hospital, and that they do in their consciences believe, that the Defendant drew upon himself the resentment of the Prosecutors, from his activity in correcting this enormous abuse, and from his having restored the wards, that had been cruelly taken away from the poor old men;—that on that just occasion the whole body of the Pensioners surrounded the apartments of their Governor, to testify their gratitude with acclamations, which sailors never bestow but on men who deserve them. This simple and honest tribute was the signal for all that has followed; the leader of these unfortunate people was turned out of office; and the affidavit of Charles Smith is filed in Court, which, I thank my God, I have not been able to read without tears;—how, indeed, could any man,—when he swears, that, for this cause alone, his place was taken from him;—that he received his dismission when languishing with sickness in the infirmary, the consequence of which

was, that his unfortunate wife, and several of his helpless, innocent children died in want and misery; —THE WOMAN ACTUALLY EXPIRING AT THE GATES OF THE HOSPITAL. That such wretches should escape chains and a dungeon, is a reproach to humanity, and to all order and government; but that they should become PROSECUTORS, is a degree of effrontery that would not be believed by any man, who did not accustom himself to observe the shameless scenes, which the monstrous age we live in is every day producing.

I come now, my Lord, to consider TO WHOM HE HAS WRITTEN.—This book is not PUBLISHED.—It was not printed for SALE, but for the more commodious distribution among the many persons who are called upon *in duty* to examine into its contents. If the Defendant had written it to calumniate, he would have thrown it abroad among the multitude: but he swears he wrote it for the attainment of reformation, and therefore confined its circulation to the proper channel, till he saw it was received as a libel, and then he even discontinued that distribution, and only showed it to his Counsel to consider of a defence;—and no better defence can be made, than that the publication was so *limited*.

My Lord, a man cannot be guilty of a libel, who presents grievances before a *competent* jurisdiction, although the facts he presents should be false; he may indeed be indicted for a malicious prosecution, and even there a probable cause would protect him,

but he can by no construction be considered as a libeller.

The case of Lake and King, in 1st Levinz, 240, but which is better reported in 1st Saunders, is directly in point; it was an action for printing a Petition to the Members of a Committee of Parliament, charging the Plaintiff with gross fraud in the execution of his office; I am aware that it was an Action on the Case, and not a criminal prosecution; but I am prepared to show your Lordship, that the precedent on that account makes the stronger for us. The truth of the matter, though part of the plea, was not the point in contest; the justification was the presenting it to a proper jurisdiction, and printing it, as in this case, for more commodious distribution; and it was first of all resolved by the Court, that the delivery of the Petition to all the Members of the Committee was justifiable;—and that it was no Libel, *whether the matter contained were true or false*, it being an appeal in a course of justice, and because the parties, to whom it was addressed, had jurisdiction to determine the matter:—that the intention of the law in prohibiting libels was to restrain men from making themselves their own judges, instead of referring the matter to those, whom the constitution had appointed to determine it;—and that to adjudge such reference to be a libel, would discourage men from making their inquiries with that freedom and readiness, which the law allows, and which the good of society re-

quires. But it was objected, he could not justify the PRINTING; for, by that means, it was published to printers and composers; but it was answered, and resolved by the whole Court, that the printing, *with intent to distribute them among the Members of the Committee*, was legal; and that the making many copies by clerks, would have made the matter more public. I said, my Lord, that this being an Action on the Case, and not an Indictment or Information, made the stronger for us; and I said so, because the Action on the Case is to redress the party in damages, for the injury he has sustained as an individual, and which he has a right to recover, unless the Defendant can show that the matter is true, or, as in this case, whether true or false, that it is an appeal to justice. Now, my Lord, if a Defendant's right to appeal to justice could, in the case of Lake and King, repel a Plaintiff's right to damages, although he was actually damnified by the appeal, how much more must it repel a criminal prosecution, which can be undertaken only for the sake of public justice, when the law says, it is for the benefit of public justice to make such appeal? And that case went to protect even falsehood, and where the Defendant was not particularly called upon in duty as an individual to animadvert:—how much more shall it protect us, who were bound to inquire, who have written nothing but truth, and who have addressed what we have written to a competent jurisdiction?

I come lastly, my Lord, to the motives which induced him to write.

The Government of Greenwich Hospital is divided into three departments:—the Council;—the Directors;—and the general Governors;—the Defendant is a member of every one of these, and therefore his duty is universal. The COUNCIL consists of the officers, whose duty it is to regulate the internal economy and discipline of the house, the Hospital being as it were a large man of war, and the Council its commanders; and therefore, these men, even by the present mutilated charter, ought all to be Seamen. Secondly, the Directors, whose duty is merely to concern themselves with the appropriation of the revenue, in contracting for and superintending supplies, and in keeping up the structure of the Hospital; and lastly, the General Court of Governors, consisting of almost every man in the kingdom with a sounding name of office:—a mere nullity, on the members of which no blame of neglect can possibly be laid; for the Hospital might as well have been placed under the tuition of the fixed stars, as under so many illustrious persons, in different and distant departments. From the Council, therefore, appeals and complaints formerly lay at the Admiralty, the Directors having quite a separate duty, and, as I have shown the Court, the Admiralty encouraged complaints of abuses, and redressed them. But since the administration of the present First Lord, the face of things has changed. I

trust it will be observed, that I do not go out of the affidavit to seek to calumniate: my respect for the COURT would prevent me, though my respect for the said First Lord might not. But the very foundation of my Client's defence depending on this matter, I must take the liberty to point it out to the Court.

The Admiralty having placed several Landmen in the offices that form the Council, a majority is often artificially secured there: and when abuses are too flagrant to be passed over in the face of day, they carry their appeal to the Directors, instead of the Admiralty, where, from the very nature of man, in a much more perfect state than the Prosecutors, they are sure to be rejected or slurred over; because these acting Directors themselves are not only under the same influence with the complainants, but the subjects of the appeals are most frequently the fruits of their own active delinquencies, or at least the consequence of their own neglects. By this manœuvre the Admiralty is secured from hearing complaints, and the First Lord, when any comes as formerly from an individual, answers with a perfect composure of muscle, that it is *coram non judice*; —it does not come through the Directors. The Defendant positively swears this to be true;—he declares that, in the course of these meetings of the Council, and of appeals to the Directors, he has been not only uniformly over-ruled, but insulted as Governor in the execution of his duty; and

the truth of the abuses which have been the subject of these appeals, as well as the insults I have mentioned, are proved by whole volumes of affidavits filed in Court, notwithstanding the numbers who have been deterred by persecution from standing forth as witnesses.

The Defendant also himself solemnly swears this to be true. He swears, that his heart was big with the distresses of his brave brethren, and that his conscience called on him to give them vent;—That he often complained,—that he repeatedly wrote to, and waited on Lord ———, without any effect, or prospect of effect; and that at last, wearied with fruitless exertions, and disgusted with the insolence of corruption in the Hospital, which hates him for his honesty, he applied to be sent, with all his wounds and infirmities, upon actual service again. The answer he received is worthy of observation;—The First Lord told him, in derision, that it would be the same thing every where else;—that he would see the same abuses in a ship; and I do in my conscience believe he spoke the truth, as far as depended on himself.

What then was the Defendant to do under the treble capacity of Lieutenant Governor, of Director, and of general Governor of the Hospital? My Lord, there was no alternative but to prepare, as he did, the statement of the abuses for the other Governors, or to sit silent, and let them continue. Had he chosen *the last*, he might have been caressed

by the Prosecutors, and still have continued the first inhabitant of a palace, with an easy independent fortune. But he preferred the dictates of honour, and he fulfilled them at the expense of being discarded, after forty years gallant service, covered with wounds, and verging to old age. But he respected the laws while he fulfilled his duty;—his object was reformation, not reproach:—he preferred a complaint, and stimulated a regular inquiry, but suspended the punishment of public shame till the guilt should be made manifest by a trial. He did not therefore *publish*, as their affidavits falsely assert, but only preferred a complaint *by distribution of copies to the Governors*, which I have shown the Court, by the authority of a solemn legal decision, is NOT A LIBEL.

Such, my Lords, is the Case. The Defendant,—not a disappointed malicious informer, prying into official abuses, because without office himself, but himself a man in office;—not troublesomely inquisitive into other men's departments, but conscientiously correcting his own;—doing it pursuant to the rules of law, and, what heightens the character, doing it at the risk of his office, from which the effrontery of power has already suspended him without proof of his guilt;—a conduct not only unjust and illiberal, but highly disrespectful to this Court, whose Judges sit in the double capacity of Ministers of the law, and Governors of this sacred and abused institution. Indeed, Lord ——— has, in my

mind, acted such a part *

[*Here, Lord Mansfield observing the Counsel heated with his subject, and growing personal on the First Lord of the Admiralty, told him, that Lord ——— was not before the Court.*]

I know, that he is not formally before the Court, but, for that very reason, *I will bring him before the Court:* he has placed these men in the front of the battle, in hopes to escape under their shelter, but I will not join in battle with them: *their* vices, though screwed up to the highest pitch of human depravity, are not of dignity enough to vindicate the combat with *me*. I will drag *him* to light, who is the dark mover behind this scene of iniquity. I assert, that the Earl of ——— has but one road to escape out of this business without pollution and disgrace: and *that is*, by publicly disavowing the acts of the Prosecutors, and restoring Captain Baillie to his command. If he does this, then his offence will be no more than the too common one of having suffered his own *personal* interest to prevail over his *public* duty, in placing his voters in the Hospital. But if, on the contrary, he continues to protect the Prosecutors, in spite of the evidence of their guilt, which has excited the abhorrence of the numerous audience that crowd this Court; IF HE KEEPS THIS INJURED MAN SUSPENDED, OR DARES TO TURN THAT SUSPENSION INTO A REMOVAL, I SHALL

THEN NOT SCRUPLE TO DECLARE HIM AN ACCOMPLICE IN THEIR GUILT, A SHAMELESS OPPRESSOR, A DISGRACE TO HIS RANK, AND A TRAITOR TO HIS TRUST. But as I should be very sorry that the fortune of my brave and honourable friend should depend either upon the exercise of Lord ———'s virtues, or the influence of his fears, I do most earnestly entreat the Court to mark the malignant object of this prosecution, and to defeat it:—I beseech you, my Lords, to consider, that even by discharging the rule, and with costs, the Defendant is neither protected nor restored. I trust, therefore, your Lordships will not rest satisfied with fulfilling your JUDICIAL duty, but, as the strongest evidence of foul abuses has, by accident, come collaterally before you, that you will protect a brave and public-spirited officer from the persecution this writing has brought upon him, and not suffer so dreadful an example to go abroad into the world, as the ruin of an upright man, for having faithfully discharged his duty.

My Lords, this matter is of the last importance. I speak not as an ADVOCATE alone—I speak to you AS A MAN—as a member of a state, whose very existence depends upon her NAVAL STRENGTH. If a misgovernment were to fall upon Chelsea Hospital, to the ruin and discouragement of our army, it would be no doubt to be lamented, yet I should not think it fatal; but if our fleets are to be crippled by the baneful influence of elections, WE ARE LOST

INDEED !—If the Seaman, who, while he exposes his body to fatigues and dangers, looking forward to Greenwich as an asylum for infirmity and old age, sees the gates of it blocked up by corruption, and hears the riot and mirth of luxurious Landmen drowning the groans and complaints of the wounded, helpless companions of his glory,—he will tempt the seas no more. The Admiralty may press HIS BODY, indeed, at the expense of humanity and the constitution, but they cannot press *his mind*—they cannot press the heroic ardour of a British Sailor ; and instead of a fleet to carry terror all round the globe, the Admiralty may not much longer be able to amuse us, with even the peaceable unsubstantial pageant of a review *.

FINE AND IMPRISONMENT !—The man deserves a PALACE instead of a PRISON, who prevents the palace, built by the public bounty of his country, from being converted into a dungeon, and who sacrifices his own security to the interests of humanity and virtue.

And now, my Lord, I have done ;—but not without thanking your Lordship for the very indulgent attention I have received, though in so late a stage of this business, and notwithstanding my great incapacity and inexperience. I resign my client into your hands, and I resign him with a well-founded confidence and hope ; because that torrent of cor-

* There had just before been a naval review at Portsmouth.

ruption, which has unhappily overwhelmed every other part of the constitution, is, by the blessing of Providence, stopped HERE by the sacred independence of the Judges. I know that your Lordships will determine ACCORDING TO LAW; and, therefore, if an information should be suffered to be filed, I shall bow to the sentence, and shall consider this meritorious publication to be indeed an offence against the laws of this country; but then I shall not scruple to say, that it is high time for every honest man to remove himself from a country, in which he can no longer do his duty to the public with safety;—where cruelty and inhumanity are suffered to impeach virtue, and where vice passes through a Court of Justice unpunished and unreproved.

SPEECH *for* THOMAS CARNAN, *Bookseller, at the Bar of the House of Commons, on the* 10*th of May,* 1779.

As taken in Short-hand.

THE SUBJECT.

BY letters patent of King James the First, the Stationers' Company, and the Universities of Oxford and Cambridge had obtained the exclusive right of printing almanacks, by virtue of a supposed copy-right in the Crown. This monopoly had been submitted to from the date of the grant in the last century, until Mr. Carnan, formerly a bookseller in St. Paul's Churchyard, printed them, and sold them in the ordinary course of his trade. This spirited and active tradesman made many improvements upon the Stationers' and University almanacks, and, at a very considerable expense, compiled many of the various classes of useful information, by which pocket almanacks have been rendered so very convenient in the ordinary occurrences of life, but which, without the addition of the calendar, few would have been disposed to purchase.

Upon the sale of Carnan's almanacks becoming extensive and profitable, the two Universities and the Stationers' Company filed a bill in the Court of Exchequer, for an injunction to restrain it; praying that the copies sold might be accounted for, and the remainder delivered up to be cancelled.

It appears from the proceedings printed at the time by the late Mr. Carnan, that the Court, doubting the validity of the King's Charter, on which the right of the Universities and of the Stationers' Company was founded, directed a question upon its legality to be argued before the Court of Common Pleas, whose Judges, after two arguments before them, certified that the patent was void in law; the Court of Exchequer thereupon dismissed the bill, and the injunction was dissolved.

Mr. Carnan having obtained this judgment, prosecuted his trade for a short time with increased activity, when a bill was introduced into the House of Commons by the late Earl of Guilford, then Lord North, Prime Minister, and Chancellor of the University of Oxford, TO REVEST, BY ACT OF PARLIAMENT, THE MONOPOLY IN ALMANACKS, WHICH HAD FALLEN TO THE GROUND BY THE ABOVEMENTIONED JUDGMENTS IN THE KING'S COURTS.

The preamble of the bill recited the exclusive right given to the Stationers and Universities by the charter of Charles the Second, as a fund for the printing of curious and learned books, the uniform enjoyment under it, the judgments of the courts of law upon the

invalidity of the charter, and the expediency of re-granting the monopoly for the same useful purposes by the authority of Parliament.

The bill being supported by all the influence of the two Universities in the House of Commons, and being introduced by Lord North in the plenitude of his authority, Mr. Carnan's opposition to it by counsel was considered at the time as a forlorn hope; but to the high honour of the House of Commons, it appears from the Journals, vol. xxxvii. p. 388, *that immediately on Mr. Erskine's retiring from the bar the House divided, and that the bill was rejected by a majority of forty-five votes.*

SPEECH

FOR

THOMAS CARNAN,

At the Bar of the House of Commons,

ON THE 10TH OF MAY, 1779.

MR. SPEAKER,

In preparing myself to appear before you, as counsel for a private individual, to oppose the enactment of a *general* and *public* statute, which was to affect the *whole* community, I felt myself under some sort of difficulty. Conscious that no man, or body of men, had a right to dictate to, or even to argue with Parliament on the exercise of the high and important trust of legislation, and that the policy and expediency of a law was rather the subject of debate in the *House*, than of argument at the *bar*, I was afraid that I should be obliged to confine myself to the special injury, which the Petitioner as an individual, would suffer, and that you might be offended with any *general* observations, which, if not applying to him personally, might be

thought unbecoming in me to offer to the superior wisdom of the House.

But I am relieved from that apprehension by the great indulgence, with which you have listened to the general scope of the question from the learned gentleman*, who has spoken before me, and likewise by the reflection, that I remember no instance, where Parliament has taken away any right conferred by the law as a common benefit, without very satisfactory evidence, that the universal good of the community required the sacrifice; because every unnecessary restraint on the natural liberty of mankind is a degree of tyranny, which no wise legislature will inflict.

The general policy of the bill is then fully open to my investigation; because, if I can succeed in exposing the erroneous principles, on which it is founded,—if I can show it to be repugnant to every wise and liberal system of government, I shall be listened to with the greater attention, and shall have the less to combat with, when I come to state the special grounds of objection, which I am instructed to represent to you on behalf of the Petitioner against it. Sir, I shall not recapitulate what you have already heard from the bar;—you are in full possession of the facts which gave rise to the question, and I shall therefore proceed directly to the investigation of the principles, which I mean to

* Mr. Davenport.

apply to them, in opposition to the bill before you,—pledging myself to you to do it with as much truth and fidelity, as if I had the honour to speak to you as a member of the House. I am confident, Sir, that, if you will indulge me with your attention, I shall make it appear, that the very same principles, which emancipated almanacks from the fetters of the prerogative in the courts of law, ought equally to free them from all parliamentary restriction.

On the first introduction of printing, it was considered, as well in England as in other countries, to be a matter of state. The quick and extensive circulation of sentiments and opinions, which that invaluable art introduced, could not but fall under the gripe of governments, whose principal strength was built upon the ignorance of the people who were to submit to them. The PRESS was, therefore, wholly under the coercion of the Crown, and *all printing*, not only of *public* books containing ordinances religious or civil, but *every species of publication whatsoever*, was regulated by the King's proclamations, prohibitions, charters of privilege, and finally by the decrees of the Star-chamber.

After the demolition of that odious jurisdiction, the Long Parliament, on its rupture with Charles the First, assumed the same power which had before been in the Crown; and after the Restoration the same restrictions were re-enacted and re-annexed to the prerogative by the statute of the 13th and 14th of Charles the Second, and continued down

by subsequent acts, till after the Revolution. In what manner they expired at last, in the time of King William, I need not state in this House; their happy abolition, and the vain attempts to revive them in the end of that reign, stand recorded on your own journals, I trust as perpetual monuments of your wisdom and virtue. It is sufficient to say, that the expiration of these disgraceful statutes, by the refusal of Parliament to continue them any longer, formed THE GREAT ÆRA OF THE LIBERTY OF THE PRESS IN THIS COUNTRY, and stripped the Crown of every prerogative over it, except that, which, upon just and rational principles of government, must ever belong to the executive magistrate in all countries, namely, the exclusive right to publish religious or civil constitutions:—in a word, to promulgate every ordinance, which contains the rules of action by which the subject is to live, and to be governed. These always did, and, from the very nature of civil government, always ought to belong to the Sovereign, and hence have gained the title of Prerogative copies.

When, therefore, the Stationers' Company, claiming the exclusive right of printing almanacks under a charter of King James the First, applied to the Court of Exchequer for an injunction against the Petitioner at your bar, the question submitted by the Barons to the learned Judges of the Common Pleas, namely, "WHETHER THE CROWN COULD "GRANT SUCH EXCLUSIVE RIGHT?" was neither more nor less than this question—*Whether alma-*

nacks were such public ordinances, such matters of state, as belonged to the King by his prerogative, so as to enable him to communicate an exclusive right of printing them to a grantee of the Crown? For the press being thrown open by the expiration of the licensing acts, nothing could remain exclusively to such grantees, but the printing of such books, as upon solid constitutional grounds belonged to the superintendance of the Crown as matters of authority and state.

The question, so submitted, was twice solemnly argued in the Court of Common Pleas; when the Judges unanimously certified, *that the Crown had no such power*; and their determination, as evidently appears from the arguments of the counsel, which the Chief Justice recognised with the strongest marks of approbation, was plainly founded on this,—that almanacks had no resemblance to those public acts religious or civil, which, on principle, fall under the superintendance of the Crown.

The counsel * who argued the case for the Plaintiffs (two of the most learned men in the profession) were aware that the King's prerogative in this particular had no absolute and fixed foundation, either by prescription or statute, but that it depended on public policy, and the reasonable limitation of executive power for the common good;—they felt that the Judges had no other standard, by which to deter-

* Mr. Serjeant Glynn and Mr. Serjeant Hill.

mine, whether it *was* a prerogative copy, than by settling upon principles of good sense, *whether it ought to be one*, they laboured therefore to show the propriety of the revision of almanacks by public authority;—they said they contained the regulation of time, which was matter of public institution, having a reference to all laws and ordinances;—that they were part of the Prayer-Book, which belonged to the King as head of the church;—that they contained matters which were received as conclusive evidence in courts of justice, and therefore ought to be published by authority;—that the trial by almanack was a mode of decision not unknown;—that many inconveniencies might arise to the public from mistakes in the matters they contained: many other arguments of the like nature were relied on, which it is unnecessary for me to enumerate in this place, as they were rejected by the court; and likewise, because the only reason of my mentioning them at all is to show, that the *public expediency or propriety* of subjecting almanacks to revision by authority, appeared to those eminent lawyers, and to the Court, which approved of their arguments, as only the standard by which the King's prerogative over them was to be measured. For if the Judges had been bound to decide on that prerogative by *strict precedent*, or by any other rule than a judicial construction of the *just and reasonable* extent of prerogative, these arguments, founded on *convenience*, *expediency*, and *propriety*, would have been downright

impertinence and nonsense; but taking them, as I do, and as the Judges did, they were (though unsuccessful, as they ought to be) every way worthy of the very able men, who maintained them for their clients.

Thus, Sir, the exclusive right of printing almanacks, which, from the bigotry and slavery of former times, had so long been monopolized as a prerogative copy, was at last thrown open to the subject, as not falling within the reason of those books, which still remain, and ever must remain, the undisputed property of the Crown.

The only two questions, therefore, that arise on the bill before you are, FIRST, Whether it be wise or expedient for Parliament to revive a monopoly, so recently condemned by the courts of law as unjust, from not being a fit subject of a monopoly, and to give it to the very same parties, who have so long enjoyed it by usurpation, and who have, besides, grossly abused it? SECONDLY, Whether Parliament can, consistently with the first principles of justice, overlook the injury, which will be sustained by the Petitioner *as an individual*, from his being deprived of the exercise of the lawful trade, by which he lives;—a trade which he began with the free spirit of an Englishman in contempt of an illegal usurpation;—a trade, supported and sanctioned by a decree of one of the highest Judicatures known to the constitution?

Surely, Sir, the bill ought to be rejected with in-

dignation by this House, under such circumstances of private injustice, independently of public inexpediency:—if you were to adopt it, the law would be henceforth a snare to the subject,—no man would venture to engage hereafter in any commercial enterprise, since he never could be sure that, although the tide of his fortunes was running in a free and legal channel, its course might not be turned by Parliament into the bosom of a monopolist.

Let us now consider more minutely the two questions for your consideration: the general policy, and the private injury.

As to the first, no doubt the Legislature is supreme, and may create monopolies which the Crown cannot. But let it be recollected, that the very same reasons, which emancipated almanacks from the prerogative in the courts below, equally apply against any interference of Parliament. If almanacks be not publications of a nature to fall within the legal construction of prerogative copy-rights, why should Parliament grant a monopoly of them, since it is impossible to deny, that, if they contain such matters as in *policy* required the stamp or revision of public authority, the exclusive right of printing them would have been inherent in the Crown by prerogative, upon legal principles of executive power, in which case an act would not have been necessary to protect the charter? and, it is equally impossible to deny, on the other hand, that, if they be not such publications as require to be issued or reviewed by

authority, they then stand on the general footing of all other printing, by which men in a free country are permitted to circulate knowledge. The bill, therefore, is either nugatory, or the patent is void;—and if the patent be void, Parliament cannot set it up again, without a dangerous infringement of the general liberty of the press.

Sir, when I reflect that this proposed monopoly is a monopoly in PRINTING, and that it gives, or rather continues it to the Company of Stationers,—the very same body of men who were the literary constables to the Star-chamber to suppress all the science and information, to which we owe our freedom, I confess I am at a loss to account for the reason or motive of the indulgence: but get the right who may, the principle is so dangerous, that I cannot yet consent to part with this view of the subject. The bill proposes, that Parliament should subject almanacks to the revision of the King's authority, when the Judges of the common law, the constitutional guardians of his prerogative, have declared that they do not on principle require that sanction:—so that your bill is neither more nor less than the reversal of a decision, admitted to be wise and just. Since as the Court was clearly at liberty to have determined the patent to have been good, if the principle by which prerogative copies have been regulated in other cases had fairly applied to almanacks, *you*, in saying that such principle *does apply*, in fact arraign that legal judgment. God for-

bid, Sir, that I should have the indecency to hint, that this reasoning concerning public convenience and expediency will ever be extended to reach other publications more important than almanacks; but certainly the principle might, with much less violence than is necessary to bring them within the pale of authority, upon the principle of the bill before you, subject the most valuable productions of the press to parliamentary regulations, and totally annihilate its freedom.

Is it not, for instance, much more dangerous, that the rise and fall of the funds, in this commercial nation, should be subject to misrepresentation, than the rise or fall of the tides?—Are not misconstructions of the arguments and characters of the Members of this high Assembly more important in their consequences, than mistakes in the calendar of those wretched saints, which still, to the wonder of all wise men, infest the liturgy of a reformed Protestant church?—Prophecies of famine, pestilence, national ruin, and bankruptcy, are surely more dangerous to reign unchecked, than prognostications of rain or dust; yet they are the daily uncontrolled offspring of every private author, and I trust will ever continue to be so; because the liberty of the press consists in its being subject to no previous restrictions, and liable only to animadversion, when that liberty is abused. But if almanacks, Sir, are held to be such matter of public consequence as to be revised by authority, and confined by a monopoly, surely

the various departments of science may, on much stronger principles, be parcelled out among the different officers of state, as they were at the first introduction of printing. There is no telling to what such precedents may lead;—the public welfare was the burden of the preambles to the licensing acts;—the most tyrannical laws in the most absolute governments speak a kind, parental language to the abject wretches, who groan under their crushing and humiliating weight;—resisting therefore a regulation and supervision of the press *beyond the rules of the common law*, I lose sight of my client, and feel that I am speaking for myself,—for every man in England. With such a legislature, as I have now the honour to address, I confess the evil is imaginary—but who can look into the future?—this precedent (trifling as it may seem) may hereafter afford a plausible inlet to much mischief,—the protection of the LAW may be a pretence for a monopoly in all books on LEGAL subjects;—the safety of the *state* may require the suppression of *histories* and *political writings*;—even philosophy herself may become once more the slave of the schoolmen, and religion fall again under the iron fetters of the church.

If a monopoly in almanacks had never existed before, and inconveniences had actually arisen from a general trade in them, the offensive principle of the bill might have been covered by a suitable preamble reciting that mischief; but having existed

above a century by convicted usurpation, so as to render that recital impossible, you are presented with this new sort of preamble, in the teeth of facts which are notorious.

[*States the preamble of the bill.*]

First, it recites an exercise and enjoyment under the King's letters patent, and then, without explaining why the patent was insufficient for its own protection, it proposes to confer, what had been just stated to be conferred already, with this most extraordinary addition, "*Any law or usage to the contrary notwithstanding.*" Sir, if the letters patent were void, they should not have been stated at all, nor should the right be said to have been exercised and enjoyed under them;—on the other hand, if they were valid, there could be no law or usage to the contrary, for contradictory laws cannot both subsist. This has not arisen from the ignorance or inattention of the framer of the bill, for the bill is ably and artfully framed; but it has arisen from the awkwardness of attempting to hide the real merits of the case. To have preserved the truth, the bill must have run thus:

Whereas the Stationers' Company and the two Universities have, for above a century last past, CONTRARY TO LAW, *usurped the right of printing almanacks, in exclusion of the rest of His Majesty's faithful people, and have from time to time harassed and vexed divers good subjects of our Lord the King*

for printing the same, till checked by a late decision of the courts of law:

Be it therefore enacted, that this usurpation be made legal, and be confirmed to them in future.

This, Sir, would have been a curiosity indeed, and would have made some noise in the House, *yet it is nothing but the plain and simple truth*;—the bill could not pass, without making a sort of bolus of the preamble to swallow it in.

So much for the introduction of the bill, which, ridiculous as it is, has nevertheless a merit not very common to the preambles of modern statutes, which are generally at cross purposes with the enacting part. Here, I confess, the enacting part closes in to a nicety with the preamble, and makes the whole a most CONSISTENT and respectable piece of tyranny, absurdity, and falsehood.

But the correctness and decency of these publications, are, it seems, the great objects in reviving and confirming this monopoly, which the preamble asserts to have been hitherto attained by it, since it states "*that such monopoly has been found to be convenient and expedient.*" But, Sir, is it seriously proposed by this bill to attain these moral objects by vesting, or rather legalizing the usurped monopoly in the Universities, under episcopal revision, as formerly?—Is it imagined that our almanacks are to come to us in future, in the classical arrangement of Oxford,—fraught with the mathematics and astronomy of Cambridge,—printed with the correct type

of the Stationers' Company,—AND SANCTIFIED BY THE BLESSINGS OF THE BISHOPS * ? I beg pardon, Sir, but the idea is perfectly ludicrous; it is notorious that the Universities sell their right to the Stationers' Company for a fixed annual sum, and that this act is to enable them to continue to do so. And it is equally notorious, that the Stationers' Company make a scandalous job of the bargain, and, to increase the sale of almanacks among the vulgar, publish, under the auspices of religion and learning, the most senseless absurdities.—I should really have been glad to have cited some sentences from the one hundred and thirteenth edition of Poor Robin's almanack, published under the revision of the Archbishop of Canterbury and the Bishop of London,—but I am prevented from doing it by a just respect for the House. Indeed, I know *no house*—but a brothel,—that could suffer the quotation. The worst part of Rochester is ladies reading when compared with them.

They are equally indebted to the calculations of their astronomers, which seem, however, to be made for a more *western* meridian than LONDON.—Plow MONDAY falls out on a SATURDAY, — and Hilary Term ends on Septuagesima Sunday. In short, Sir, their almanacks have been, as every thing else that is monopolized must be,—uniform and ob-

* The imprimatur of the Archbishop of Canterbury and Bishop of London was necessary by the letters patent.

stinate in mistake and error, for want of the necessary rivalry. It is not worth their while to unset the press to correct mistakes, however gross and palpable, because they cannot affect the sale. If the moon is made to rise in the west, she may continue to rise there for ever.—When ignorance, nonsense, and obscenity were thus hatched under the protection of a royal patent, how must they thrive under the wide spreading fostering wings of an act of Parliament;—whereas in Scotland, and in Ireland, where the trade in almanacks has been free and unrestrained, they have been eminent for exactness and useful information. The act recognises the truth of this remark, and prohibits the importation of them.

But, Sir, this bill would extend not only to monopolize almanacks, but every other useful information published with almanacks, which render the common businesses of life familiar. It is notorious, that the various lists and tables, which are portable in the pocket, are not saleable without almanacks;—yet all these, Sir, are to be given up to the Stationers' Company, and taken from the public by the large words in the bill, of *books*, *pamphlets*, *or papers*; since the booksellers cannot afford to compile these useful works, which, from their extensive circulation, are highly beneficial to trade, and to the revenue of stamps, if they must purchase from the Stationers' Company the almanack annexed to them, because the Company must have a profit, which will enhance their price.—In short, Sir, Par-

liament is going to tear a few innocent leaves out of books of most astonishing circulation, and of very general use, by which they will be rendered unsaleable, merely to support a monopoly, established in the days of ignorance, bigotry, and superstition, which has deviated from the ends of its institution, senseless and worthless as they were, and which could not stand a moment, when dragged by a public-spirited citizen, into the full sunshine of a MODERN English court of justice.

It would be a strange thing, Sir, to see an odious monopoly, which could not even stand upon its legs in Westminster Hall, upon the broad pedestal of prerogative, though propped up with the precedents, which the decisions of judges in darker ages had accumulated into law,—it would be a strange thing to see such an abuse supported and revived by the Parliament of Great Britain in the eighteenth century, in the meridian of the arts, the sciences, and liberty,—to see it starting up among your numberless acts of liberal toleration, and boundless freedom of opinion.—God forbid, Sir, that at this time of day we should witness such a disgrace as the monopoly of a two-penny almanack, rising up like a tare among the rich fields of trade, which the wisdom of your laws has blown into a smiling harvest all around the globe.

But, Sir, I forget myself;—I have trespassed too long upon your indulgence;—I have assumed a language fitter, perhaps, for the House than for its

bar; I will now therefore confine myself in greater strictness to my duty as an advocate, and submit to your *private justice*, that, let the *public policy* of this bill be what it may, the individual, whom I represent before you, is entitled to your protection against it.

Mr. Carnan, the Petitioner, had turned the current of his fortunes into a channel, perfectly open to him in law, and which, when blocked up by usurpation, he had cleared away at a great expense, by the decision of one of the highest courts in the kingdom. Possessed of a decree, founded too on a certificate from the Judges of the common law,—was it either weak or presumptuous in an Englishman to extend his views, that had thus obtained the broadest seal of justice?—Sir, he *did* extend them with the same liberal spirit in which he began;—he published twenty different kinds of almanacks, calculated for different meridians and latitudes, corrected the blunders of the lazy monopolists, and, supported by the encouragement which laudable industry is sure to meet with in a free country, he made that branch of trade his first and leading object,—and I challenge the framer of this bill (even though he should happen to be at the head of His Majesty's Government) to produce to the House a single instance of immorality, or of any mistake or uncertainty, or any one inconvenience arising to the public from this general trade, which he had the merit of redeeming from a disgraceful and illegal monopoly.—

On the contrary, much useful learning has been communicated, a variety of convenient additions introduced, and many egregious errors and superstitions have been corrected. Under such circumstances I will not believe it possible, that Parliament can deliver up the honest labours of a citizen of London to be damasked and made waste paper of (as this scandalous bill expresses it) by any man or body of men in the kingdom. On the contrary, I am sure the attempt to introduce, through the Commons of England, a law so shockingly repugnant to every principle, which characterizes the English Government, will meet with your just indignation as an insult to the House, whose peculiar station in the government is the support of *popular freedom*. For, Sir, if this act were to pass, I see nothing to hinder any man, who is turned out of possession of his neighbour's estate by legal ejectment, from applying to you to give it him back again by act of Parliament.—The fallacy lies in supposing, that the Universities and Stationers' Company *ever had* a right to the monopoly, which they have exercised so long. The preamble of the bill supposes it,—but, as it is a supposition in the very teeth of a judgment of law,—it is only an aggravation of the impudence of the application.

And now, Mr. Speaker, I retire from your bar, I wish I could say with confidence of having prevailed.—If the wretched Company of Stationers had been my only opponents, my confidence had been

perfect ;—indeed so perfect, that I should not have wasted ten minutes of your time on the subject, but should have left the bill to dissolve in its own weakness: but, when I reflect that OXFORD AND CAMBRIDGE are suitors here, I own to you I am alarmed, and I feel myself called upon to say something, which I know your indulgence will forgive. The House is filled with their most illustrious sons, who no doubt feel an involuntary zeal for the interest of their parent Universities.—Sir, it is an influence so natural, and so honourable, that I trust there is no indecency in my hinting the *possibility of its operation*. Yet I persuade myself that these learned bodies have effectually defeated their own interests, by the sentiments which their liberal sciences have disseminated amongst you ;—their wise and learned institutions have erected in your minds the august image of an enlightened statesman, which, trampling down all personal interests and affections, looks steadily forward to the great ends of public and private justice, unawed by authority, and unbiassed by favour.

It is from thence my hopes for my client revive.—If the Universities have lost an advantage, enjoyed contrary to law, and at the expense of sound policy and liberty, you will rejoice that the courts below have pronounced that wise and liberal judgment against them, and will not set the evil example of reversing it *here*. But you need not therefore forget, that the Universities *have* lost an advantage,—and

if it be a loss that can be felt by bodies so liberally endowed, it may be repaired to them by the bounty of the Crown, or by your own.—It were much better that the people of England should pay ten thousand pounds a year to each of them, than suffer them to enjoy one farthing at the expense of the ruin of a free citizen, or the monopoly of a free trade *.

* According to the seasonable hint at the conclusion of the speech, *which perhaps had some weight* in the decision of the House to reject the bill, a parliamentary compensation was afterwards made to the Universities, and remains as a monument erected by a British Parliament to a free press.

SPEECH

AGAINST CONSTRUCTIVE TREASON.

THE occasion of the prosecution of Lord George Gordon for High Treason is but too well remembered; but the general outlines of the extraordinary event which led to it, and of the evidence given upon the trial, may nevertheless lead to the better understanding of the following Speech.

A bill had been brought into Parliament, the session of 1778, *by Sir George Saville, one of the most upright men which perhaps any age or country ever produced, to relieve the Roman Catholic subjects of England from some of the penalties they were subject to, by an act passed in the eleventh and twelfth year of King William the Third, an act supposed by many to have originated in faction, and which at all events, from many important changes, since the time of its enactment, had become unnecessary, and therefore unjust.*

On the passing of this bill, which required a test of fidelity from the Roman Catholics who claimed its protection, many persons of that religion, and of the first families and fortunes in the kingdom, came forward with the most zealous professions of attachment to the

Government, so that the good effects of the indulgence were immediately felt; and hardly any murmur from any quarter was heard. This act of Sir George Saville did not extend to Scotland; but in the next winter it was proposed by persons of distinction in that country, to revise the penal laws in force against the Catholics of that kingdom: at least a report prevailed of such intention. This produced tumults in Edinburgh, in which some Popish chapels and mass-houses were destroyed, and the attempt to extend the Statute to North Britain was given up.

Upon this occasion a great number of Protestant societies were formed in Scotland, and the memorable one in London was soon afterwards erected under the name of the Protestant Association. Large subscriptions were raised in different parts of the kingdom, a secretary was publicly chosen, and correspondences set on foot between the different societies in England and Scotland, for the purpose of petitioning Parliament to repeal Sir George Saville's act, which was represented at these meetings, and branded in their various publications, as big with danger to the constitution, both of church and state.

In the month of November 1779, *Lord George Gordon, youngest brother of His Grace the Duke of Gordon, and at that time a member of the House of Commons, was unanimously invited to become president of the London Association, where he afterwards regularly attended till the catastrophe of* 1780, *when he was committed to the Tower.*

The object of the Protestant Association was to procure a repeal of the act of Parliament by petition, as appears from all their resolutions, which were publicly printed and distributed, without any interruption from the magistracy for many months together; and although it was undoubtedly meant, by the numbers and zeal of the petitioners, that Parliament should feel the propriety of repealing the act, and even an alarm of prudence in refusing to yield to the solicitation of multitudes, not numbered, nor capable of numeration; yet in all probability Mr. Erskine was justified by the real fact, when he asserted that the idea of absolute force and compulsion, by armed violence, *never was in the contemplation of the Prisoner, or of any who afterwards attended him on the memorable second of June. So certain is it that the destinations of mobs may not be dictated by their leaders, or even known to themselves; a truth which highly enhances the guilt of assembling them.*

After the opening of the Attorney General, the case for the Crown was introduced by the evidence of William Hay, who had attended the meetings of the Protestant Association, and who swore that the Prisoner announced, that the associated Protestants amounted to above forty thousand persons, and directed them to assemble on Friday the 2d of June, in four separate columns or divisions, dressed in their best clothes, with blue cockades as a badge of distinction. The witness further swore, that the Prisoner declared that the King had broken his coronation oath; and he also spoke

to his attendance at the House of Commons on the 2d of June, and his exhortation to the multitude in the lobby to adhere to so good and glorious a cause; for though there was little hope from the House of Commons, they would meet with redress from their mild and gracious Sovereign. Mr. Hay also spoke to the burning of the different mass-houses; and, upon his cross-examination, appeared to have been in every quarter where mischief was committing. This gentleman was very ably cross-examined by Mr. Kenyon, afterwards Lord Kenyon, and the result of it appears at large in the following Speech, where much reliance was placed on it by Mr. Erskine, in discredit of the witness, and in protection of the Prisoner. It was afterwards proved by Mr. Anstruther, M. P. that the Prisoner at Coachmakers' Hall, where the Association assembled, desired the whole body to meet him on the 2d of June, to go up with the petition, declaring, that, if there was one less than twenty thousand men, he would not present it, but that they must find another president, as he would have nothing to do with them: that he reccommended temperance and firmness, by which he said the Scotch had carried their point, and added, that he did not mean them to go into any danger which he would not share, as he would go to death for the Protestant cause. Mr. Anstruther further proved the Prisoner's directions with regard to the order of the assembling, and his conduct in the lobby of the House of Commons, viz. "that he told "them they were called a mob in the House, but that "they were peaceable petitioners; that he had no doubt

" His Majesty would send to his Ministers to repeal the " act when he saw the confusion it created." He further proved, that several people called to Lord George, and asked him whether he desired them to disperse, to which he replied, " You are the best judges of what " you ought to do—but I will tell you how the matter " stands.—The House are going to divide upon " the question, whether your petition shall be taken into " consideration now or on Tuesday. There are for " taking it into consideration now, only myself and six " or seven others. If it is not taken into consideration " now, your petition may be lost ; to-morrow the House " does not meet, Monday is the King's birth-day, and " upon Tuesday the Parliament may be dissolved or " prorogued." The multitude in the avenues of the Houses of Parliament, and the consequent clamour and obstruction, it seems, continued after this. Mr. Anstruther gave this evidence with great coolness and precision ; and it appears from the printed trial, that the Prisoner's Counsel thought it prudent to avoid any cross-examination of him.

Mr. Bowen, the Chaplain of the House of Commons, proved, that the Prisoner told the multitude that Mr. Rous had just moved, that the civil power should be sent for, but that they need not mind it ;—they had only to keep themselves cool and steady. The Chaplain further stated, that he had advised Lord George to disperse them, and told him that he had heard in the lobby that they would go if he desired it. That the Prisoner then addressed them from the gallery, advising

them to be quiet and steady;—that His Majesty was a gracious Sovereign, and when he heard that the people miles round were collecting, he would send his Ministers private orders to repeal the bill; that an attempt had been made to introduce a bill into Scotland; that the Scotch had no redress till they pulled down the mass-houses; that then Lord Weymouth sent them official assurances that the act should not extend to them. *That he then advised them to be quiet and peaceable, and told them to beware of evil-minded persons, who would mix among them and entice them to mischief, the blame of which would be imputed to them. That somebody in the lobby then asked the Prisoner if it was not necessary for them to retire; and that he answered, "I will tell you how it is: The question was put;* "*I moved that your petition should be taken into consi-*" *deration to-night. It was clearly against you, but* "*I insisted upon dividing the House*—NO DIVISION "CAN TAKE PLACE WHEN YOU ARE THERE *; "BUT TO GO OR NOT, I LEAVE TO YOURSELVES." *The Chaplain then said, that the Prisoner laid hold of his gown, and presented him to the people as the clergyman of the House of Commons, saying,* "*Ask* "*him his opinion of the Popish Bill,*" *to which he answered, that the only answer he would give was, that all the consequences which might arise from that night would be entirely owing to him; to which the Prisoner made no reply, but went into the House; and when*

* On a division one part of the House go forth into the lobby.

the Speaker went in, there were cries of "Repeal, "Repeal."

Mr. Joseph Pearson, the Door-keeper of the House of Commons, was also examined for the Crown. He proved the presence of the mob, and their cries of "No "Popery," and "Repeal, Repeal." — And with respect to Lord George Gordon himself, he said that his Lordship came to the door two or three times, saying, he would come out and let them know what was going on,—that they had a good cause, and had nothing to fear,—that Sir Michael Le Fleming had spokem for them like an angel. The witness added, that as they crowded upon him he called out, "For God's sake, Gen- "tlemen, keep from the door." That the Prisoner put his hand out, waving it, and said, "Pray, Gentlemen, "make what room you can,—Your cause is good, and "you have nothing to fear." Other witnesses were examined to what passed in the lobby, the material substance of whose testimony the Editor has extracted from the printed trial. The rest of the evidence went to prove those scenes of disorder and violence, which are but too well remembered without narration.

In the course of the evidence for the Crown respecting the riots and burnings in London, a paper was produced by Richard Pond, a witness, who swore that, hearing his house was to be pulled down, he applied to the Prisoner for a protection, which he presented to him in the following words, and which was signed by the Prisoner:

" *All true friends to Protestants, I hope, will be* " *particular, and do no injury* to the property of any " true Protestant, *as I am well assured the* PRO- " PRIETOR * *of this house is a staunch and worthy* " *friend to the cause.*

" G. GORDON."

The Attorney General was also in possession of some letters and papers, which Mr. Dingwall, a jeweller, was called to establish; but he said he was not sufficiently acquainted with Lord George's hand to prove them.

On the whole of the evidence, the Counsel for the Crown contended, that the Prisoner, by assembling the multitude round the Houses of Parliament, to enforce their purposes by violence and numbers, or even to overawe and intimidate the Legislature in their deliberations, was a levying of war against the King in his realm, within the statute of treasons of the twenty-fifth of Edward the Third; a doctrine which was fully confirmed by the Court; and they concluded with contending that the overt acts established by the evidence were the only means, by which the Prisoner's traitorous purposes could possibly be proved. On the close of the evidence for the Crown, the late Lord Kenyon, then Mr. Kenyon, senior Counsel for the Prisoner, addressed the Jury in a speech of much ability and judgment, and, according to usual practice, should then have been fol-

* The tenant was a Catholic.

lowed by Mr. Erskine, before the examination of the Prisoner's witnesses: but it appears from the printed trial, that Mr. Erskine claimed the right of reserving his address to the Jury till after the final close of the whole evidence on both sides, which he said was matter of great privilege to the Prisoner, and for which he stated that there was a precedent, the protection of which he should insist upon for his Client. This being assented to by the Court, eleven or twelve witnesses were called on the part of the Prisoner, the great object of whose examinations was to negative the conclusions drawn by the Crown from the evidence laid before the Jury. For this purpose the different expressions culled out from the proceedings at Coachmakers' Hall, and the lobby of the House of Commons, were contrasted with the general tenour of the Prisoner's behaviour from his first becoming President of the Protestant Association.

The Rev. Mr. Middleton, a member of the Association, was the first witness: he said he had watched all his conduct, and declared that he appeared animated with the greatest loyalty to the King, and attachment to the Constitution;—that nothing in any of his speeches at the Association contained any expressions disloyal or improper, nor tended directly or indirectly to a repeal of the Bill BY FORCE;—*that he expressed the cockade to be only a badge to prevent disorderly people from mixing in the procession of the Association;—that he desired them not to carry even sticks, and begged that riotous persons might be delivered up to the constables. Several other*

witnesses were examined to the same effect as Mr. Middleton, particularly Mr. Evans an eminent Surgeon, who swore that he saw Lord George in the centre of one of the divisions in Saint George's Fields, and that it appeared at that time from his conduct and expressions, that, to prevent all disorder, his wish was not to be attended across the bridge by the multitude. This evidence was confirmed by several other respectable witnesses; and it appeared also, that the bulk of the people in the lobby, and in Palace Yard, were not members of the Association, but idlers, vagabonds, and pickpockets, who had put cockades in their hats and joined the Association in their progress. This fact was particularly established by the evidence of Sir Philip Jennings Clerke, who said that the people assembled round the House of Commons were totally different, both in appearance and behaviour, from the members of the Association who were assembled by the Prisoner, and who formed the original procession to carry up the Petition.

The Earl of Lonsdale (then Sir James Lowther) was also examined for the Prisoner, and swore that he carried Lord George and Sir Philip Jennings Clerke from the House of Commons; that the carriage was surrounded with great multitudes, who inquired of Lord George the fate of the Petition, who answered, that it was uncertain, and earnestly entreated them to retire to their homes and be quiet.

On the close of the evidence, which was about midnight, Mr. Erskine rose, and addressed the Jury in the following Speech. The Solicitor General replied, and

the Jury, after being charged by the venerable Earl of Mansfield, then Chief Justice, retired to deliberate. They returned into Court about three in the morning, and brought in a verdict NOT GUILTY, *which was repeated from mouth to mouth to the uttermost extremities of London, by the multitudes which filled the streets.*

The Editor, though he forbears from observing upon the arguments he has collected, cannot forbear remarking, that the great feature of the following Speech is, that it combated successfully the doctrine of constructive treasons, a doctrine highly dangerous to the public freedom.

It is recorded of Dr. Johnson, that he expressed his satisfaction at the acquittal of this nobleman on that principle. "*I am glad,*" *said he,* "*that Lord George* "*Gordon has escaped, rather than a precedent should* "*be established of hanging a man for constructive* "*treason* *."

* Boswell's Life of Johnson.

SPEECH

FOR

LORD GEORGE GORDON.

GENTLEMEN OF THE JURY,

MR. Kenyon * having informed the Court that we propose to call no other witnesses, it is now my duty to address myself to you, as counsel for the noble Prisoner at the bar, the whole evidence being closed;—I use the word closed, because it is certainly not finished, since I have been obliged to leave the place in which I sat, to disentangle myself from the volumes of men's names, which lay there under my feet, whose testimony, had it been necessary for the defence, would have confirmed all the facts that are already in evidence before you.

Gentlemen, I feel myself entitled to expect, both from you and from the Court, the greatest indulgence and attention;—I am, indeed, a greater ob-

* Afterwards Lord Kenyon, and Chief Justice of the Court of King's Bench.

Mr. Erskine sat originally in the front row, under which there were immense piles of papers; and he retired back, before he began to address the Jury.

ject of your compassion, than even my noble friend whom I am defending.—He rests secure in conscious innocence, and in the well-placed assurance, that it can suffer no stain in your hands:—not so with ME;—I stand up before you a troubled, I am afraid a *guilty* man, in having presumed to accept of the awful task, which I am now called upon to perform;—a task, which my learned friend who spoke before me, though he has justly risen by extraordinary capacity and experience, to the highest rank in his profession, has spoken of with that distrust and diffidence, which becomes every Christian in a cause of blood. If Mr. Kenyon has such feelings, think what mine must be.—Alas! Gentlemen, who am I?—a young man of little experience, unused to the bar of criminal courts, and sinking under the dreadful consciousness of my defects. I have however this consolation, that no ignorance nor inattention on my part, can possibly prevent you from seeing, under the direction of the Judges, that the Crown has established no case of treason.

Gentlemen, I did expect, that the Attorney General, in opening a great and solemn state prosecution, would have at least indulged the advocates for the Prisoner with his notions on the law, as applied to the case before you, in less general terms. It is very common indeed, in little civil actions, to make such obscure introductions by way of trap;—but in criminal cases, it is unusual and unbecoming; because the right of the Crown to

reply, even where no witnesses are called by the Prisoner, gives it thereby the advantage of replying, without having given scope for observations on the principles of the opening, with which the reply must be consistent.

One observation he has, however, made on the subject, in the truth of which I heartily concur, viz. That the crime, of which the noble person at your bar stands accused, is the very *highest* and most *atrocious* that a member of civil life can possibly commit; because it is not, like all *other* crimes, merely an *injury* to society from the breach of some of its reciprocal relations, but is an attempt *utterly to dissolve and destroy society altogether*.

In nothing therefore is the wisdom and justice of our laws so strongly and eminently manifested, as in the *rigid, accurate, cautious, explicit, unequivocal* definition of what shall constitute this high offence ;—for, high treason consisting in the breach and dissolution of that allegiance, which binds society together, if it were left ambiguous, uncertain, or undefined, all the other laws established for the personal security of the subject would be utterly useless ;—since this offence, which, from its nature, is so capable of being created and judged of, by rules of political expediency on the spur of the occasion, would be a rod at will to bruise the most virtuous members of the community, whenever virtue might become troublesome or obnoxious to a bad government.

Injuries to the persons and properties of our neigh-

bours, considered as individuals, which are the subjects of all other criminal prosecutions, are not only capable of greater precision, but the powers of the state can be but rarely interested in straining them, beyond their legal interpretation;—but if *treason, where the government itself is directly offended,* were left to the judgment of its ministers, without any boundaries,—nay, without the most *broad, distinct,* and *inviolable* boundaries marked out by law,—there could be no public freedom,—and the condition of an Englishman would be no better than a slave's at the foot of a Sultan; since there is little difference whether a man dies by the stroke of a sabre, without the forms of a trial, or by the most pompous ceremonies of justice, if the crime could be made at pleasure by the state to fit the fact that was to be tried.

Would to God, Gentlemen of the jury, that this were an observation of theory alone, and that the page of our history was not blotted with so many melancholy disgraceful proofs of its truth!—but these proofs, melancholy and disgraceful as they are, have become glorious monuments of the wisdom of our fathers, and ought to be a theme of rejoicing and emulation to us. For from the mischiefs constantly arising to the state from every extension of the ancient law of treason, the ancient law of treason has been always restored, and the constitution at different periods washed clean,—though unhappily with the blood of oppressed and innocent men.

When I speak of the ancient law of treason, I mean the venerable statute of King Edward the Third, on which the indictment you are now trying, is framed;—a statute made, as its preamble sets forth, for the more precise definition of this crime, which had not, by the common law, been sufficiently explained; and consisting of different and distinct members, the plain *unextended letter* of which was thought to be a sufficient protection to the person and honour of the sovereign, and an adequate security to the laws committed to his execution. I shall mention only two of the number, the others not being in the remotest degree applicable to the present accusation.

To compass, or imagine the death of the King; such imagination, or purpose of the mind (visible only to its great Author), being manifested by some open act; an institution obviously directed, not only to the security of his natural person, but to the stability of the government; the life of the prince being so interwoven with the constitution of the state, that an attempt to destroy the one, is justly held to be a rebellious conspiracy against the other.

Secondly, which is the crime charged in the indictment, *To levy war against him in his realm*;—a term that one would think could require no explanation, nor admit of any ambiguous construction amongst men, who are willing to read laws according to the plain signification of the language, in which they are written; but which has nevertheless been an

abundant source of that constructive cavil, which this sacred and valuable act was made expressly to prevent. The real meaning of this branch of it, as it is bottomed in policy, reason, and justice,—as it is ordained in plain unambiguous words,—as it is confirmed by the precedents of justice, and illustrated by the writings of the great lights of the law, in different ages of our history,—I shall, before I sit down, impress upon your minds as a safe, unerring standard, by which to measure the evidence you have heard. At present I shall only say, that far and wide as judicial decisions have strained the construction of levying war, beyond the warrant of the statute, to the discontent of some of the greatest ornaments of the profession, they hurt not me;—as a citizen I may disapprove of them,—but as advocate for the noble person at your bar, I need not impeach their authority; because none of them have said more than this,—that war may be levied against the King in his realm, not only by an insurrection to change, or to destroy the fundamental constitution of the government itself by rebellious war, but, by the same war, to endeavour to suppress the execution of the laws it has enacted, or to violate and overbear the protection they afford, not to individuals (which is a private wrong), but to any general class or description of the community, BY PREMEDITATED OPEN ACTS OF VIOLENCE, HOSTILITY, AND FORCE.

Gentlemen, I repeat these words, and call solemnly on the Judges to attend to what I say, and to

contradict me if I mistake the law,—BY PREMEDITATED, OPEN ACTS OF VIOLENCE, HOSTILITY, AND FORCE;—nothing equivocal;—nothing ambiguous;—no intimidations, or overawings, which signify nothing precise or certain, because what frightens one man, or set of men, may have no effect upon another;—but that which COMPELS and COERCES;—OPEN VIOLENCE AND FORCE.

Gentlemen, this is not only the whole text, but, I submit it to the learned Judges, under whose correction I am happy to speak, an accurate explanation of the statute of treason, as far as it relates to the present subject, taken in its utmost extent of judicial construction, and which you cannot but see not only in its letter, but in its most strained signification, is confined to acts which *immediately*,—*openly*,—and *unambiguously*, strike at the very root and being of government, and not to any other offences, however injurious to its peace.

Such were the boundaries of high treason marked out in the reign of Edward the Third; and as often as the vices of bad princes, assisted by weak submissive parliaments, extended state offences beyond the strict letter of that act, so often the virtue of better princes and wiser parliaments brought them back again.

A long list of new treasons, accumulated in the wretched reign of Richard the Second, from which (to use the language of the act that repealed them) "no man knew what to do or say for doubt

" of the pains of death," were swept away in the first year of Henry the Fourth, his successor; and many more, which had again sprung up in the following distracted arbitrary reigns, putting tumults and riots on a footing with armed rebellion, were again levelled in the first year of Queen Mary, and the statute of Edward made once more the standard of treasons. The acts indeed for securing His present Majesty's illustrious house from the machinations of those very Papists, *who are now so highly in favour*, have since that time added to the list; but these not being applicable to the present case, the ancient statute is still our only guide; which is so plain and simple in its object, so explicit and correct in its terms, as to leave no room for intrinsic error; and the wisdom of its authors has shut the door against all extension of its plain letter; declaring in the very body of the act itself, that nothing out of that plain letter should be brought within the pale of treason by inference or construction, but that, if any such cases happened, they should be referred to the Parliament.

This wise restriction has been the subject of much just eulogium by all the most celebrated writers on the criminal law of England. Lord Coke says,—The Parliament that made it was on that account called Benedictum or Blessed: and the learned and virtuous Judge Hale, a bitter enemy and opposer of constructive treasons, speaks of this sacred institution with that enthusiasm, which it cannot but inspire in

the breast of every lover of the just privileges of mankind.

Gentlemen, in these mild days, when juries are so free, and judges so independent, perhaps all these observations might have been spared as unnecessary;—but they can do no harm; and this history of treason, so honourable to England, cannot (even imperfectly as I have given it) be unpleasant to Englishmen. At all events, it cannot be thought an inapplicable introduction to saying, that Lord George Gordon, who stands before you indicted for that crime,—is not,—*cannot* be guilty of it, unless he has levied war against the King in his realm, contrary to the plain letter, spirit, and intention of the act of the twenty-fifth of Edward the Third; to be extended by no *new or occasional constructions*,—to *be strained by no fancied analogies*,—to *be measured by no rules of political* expediency,—to *be judged of by no theory*,—to *be determined by the wisdom of no individual, however wise*,—*but to be expounded by the simple, genuine* LETTER *of the law*.

Gentlemen, the only overt act charged in the indictment is—the assembling the multitude, which we all of us remember went up with the petition of the associated Protestants on the second day of last June; and in addressing myself to a humane and sensible jury of Englishmen, sitting in judgment on the life of a fellow-citizen, more especially under the direction of a Court so filled as this is, I trust I need not remind you, that the *purposes*

of that multitude, as originally assembled on that day, *and the purposes and acts of him who assembled them*, are the sole objects of investigation; and that all the dismal consequences which followed, and which naturally link themselves with this subject in the firmest minds, must be altogether cut off, and abstracted from your attention,—*further than the evidence warrants their admission.* Indeed, if the evidence had been coextensive with these consequences;—if it had been proved that the same multitude, *under the direction of Lord George Gordon*, had afterwards attacked the Bank,—broke open the prisons,—and set London in a conflagration, I should not now be addressing you.—Do me the justice to believe, that I am neither so foolish as to imagine I could have defended him, nor so profligate as to wish it if I could. But when it has appeared, not only by the evidence in the cause, but by the evidence of the thing itself,—BY THE ISSUES OF LIFE, WHICH MAY BE CALLED THE EVIDENCE OF HEAVEN, that these dreadful events were either entirely unconnected with the assembling of that multitude to attend the petition of the Protestants, or, at the very worst, the unforeseen, undesigned, unabetted, and deeply regretted consequences of it, I confess the seriousness and solemnity of this trial sink and dwindle away. Only abstract from your minds all that misfortune, accident, and the wickedness of others have brought upon the scene;—and the cause requires no advocate. When I say that it requires

no advocate, I mean that it requires no argument to screen it from the guilt of *treason*. For though I am perfectly convinced of the purity of my noble friend's intentions, yet I am not bound to defend his prudence, nor to set it up as a pattern for imitation; since you are not trying him for imprudence, for indiscreet zeal, or for want of foresight and precaution,—but for a deliberate and malicious predetermination to overpower the laws and government of his country, by HOSTILE, REBELLIOUS FORCE.

The indictment therefore first charges, that the multitude, assembled on the 2d of June, "WERE "ARMED AND ARRAYED IN A WARLIKE MANNER:" which indeed, if it had omitted to charge, we should not have troubled you with any defence at all, because no judgment could have been given on so defective an indictment; for the statute never meant to put an unarmed assembly of citizens on a footing with armed rebellion; and the crime, whatever it is, must always appear on the record to warrant the judgment of the Court.

It is certainly true, that it has been held to be matter of evidence, and dependent on circumstances, what numbers, or species of equipment and order, though not the regular equipment and order of soldiers, shall constitute an army, so as to maintain the averment in the indictment of a warlike array; and likewise, what kinds of violence, though not pointed at the King's person, or the existence of the government, shall be construed to be war against

the King. But as it has never yet been maintained in argument, in any Court of the kingdom, or even speculated upon in theory,—that a multitude, without either weapons offensive or defensive of any sort or kind, and yet not supplying the want of them by such acts of violence, as multitudes sufficiently great can achieve without them, was a hostile array within the statute;—as it has never been asserted by the wildest adventurer in constructive treason, that a multitude,—armed with nothing,—threatening nothing,—and doing nothing, was an army levying war; I am entitled to say, that the evidence does not support the first charge in the indictment; but that, on the contrary, it is manifestly false:—false in the knowledge of the Crown, which prosecutes it;—false in the knowledge of every man in London, who was not bed-ridden on Friday the 2d of June, and who saw the peaceable demeanour of the associated Protestants.

But you will hear, no doubt, from the Solicitor General *(for they have saved all their intelligence for the reply)* that fury supplies arms;—*furor arma ministrat*;—and the case of Damaree will, I suppose, be referred to; where the people assembled, had no banners or arms, but only clubs and bludgeons: yet the ringleader, who led them on to mischief, was adjudged to be guilty of high treason for levying war. This judgment it is not my purpose to impeach, for I have no time for digression to points that do not press upon me. In the case of Damaree,

the mob, though not regularly armed, were provided with such weapons as best suited their mischievous designs:—their designs were, besides, open and avowed, and all the mischief was done that could have been accomplished, if they had been in the completest armour:—they burnt Dissenting meeting-houses protected by law, and Damaree was taken at their head, *in flagrante delicto*, with a torch in his hand not only in the very act of destroying one of them, but leading on his followers, *in person*, to the *avowed* destruction of all the rest. There could therefore be no doubt of *his* purpose and intention, nor any great doubt that the perpetration of such purpose was, from *its generality*, high treason, if perpetrated by such a force, as distinguishes a felonious riot from a treasonable levying of war. The principal doubt therefore in that case was, whether such an unarmed riotous force was war, within the meaning of the statute; and on that point very learned men have differed; nor shall I attempt to decide between them, because in this one point they all agree. *Gentlemen, I beseech you to attend to me here.* I say on this point they all agree; *that it is the* INTENTION *of assembling them, which forms the guilt of treason:* I will give it you in the words of high authority, the learned Foster; whose private opinions will, no doubt, be pressed upon you as doctrine and law, and which if taken together, as all opinions ought to be, and not extracted in smuggled sentences to

serve a shallow trick, I am contented to consider as authority.

That great Judge, immediately after supporting the case of Damaree, as a levying war within the statute, against the opinion of Hale, in a similar case, viz. the destruction of bawdy-houses, which happened in his time, says, " *The true criterion therefore seems to be* " —quo animo *did the parties assemble?—with what* " *intention did they meet?*"

On that issue, then, by which I am supported by the whole body of the criminal law of England;—concerning which there are no practical precedents of the Courts that clash, nor even abstract opinions of the closet that differ, I come forth with boldness to meet the Crown; for even supposing that peaceable multitude,—though not hostilely arrayed,—though without one species of weapon among them,—though assembled without plot or disguise by a public advertisement, exhorting, nay commanding peace, and inviting the magistrates to be present to restore it, if broken:—though composed of thousands who are now standing around you, unimpeached and unreproved, yet who are all principals in treason, if such assembly was treason; supposing, I say, this multitude to be nevertheless an army within the statute, still the great question would remain behind, on which the guilt or innocence of the accused must singly depend, and which it is your exclusive province to determine:—namely, whether they were assembled by my noble Client, *for the traitorous purpose*

charged in the indictment?—For war must not only be levied, but it must be levied against the King in his realm, *i. e.* either directly against his person to alter the constitution of the government, of which he is the head, or to suppress the laws, committed to his execution, BY REBELLIOUS FORCE. You must find that Lord George Gordon assembled these men *with that traitorous intention*:—you must find not merely a riotous illegal *petitioning*,—not a tumultuous, indecent importunity to influence Parliament,—not the compulsion of motive, from seeing so great a body of people united in sentiment and clamorous supplication,—BUT THE ABSOLUTE, UNEQUIVOCAL COMPULSION OF FORCE, FROM THE HOSTILE ACTS OF NUMBERS UNITED IN REBELLIOUS CONSPIRACY AND ARMS.

This is the issue you are to try: for crimes of all denominations consist wholly in the purpose of the human will producing the act: *Actus non facit reum nisi mens sit rea.*—The act does not constitute guilt, unless *the mind* be guilty. This is the great text from which the whole moral of penal justice is deduced: it stands at the top of the criminal page, throughout all the volumes of our humane and sensible laws, and Lord Chief Justice Coke, whose chapter on this crime is the most authoritative and masterly of all his valuable works, ends almost every sentence with an emphatical repetition of it.

The indictment *must* charge an open *act*, because the purpose of the mind, which is the object of trial, can only be known by actions; or, again to use the words of Foster, who has ably and accurately expressed it, "the traitorous purpose is "the treason, the overt act, the means made use "of to effectuate the intentions of the heart."—But why should I borrow the language of Foster, or of any other man, when the language of the indictment itself is lying before our eyes? What does it say? Does it directly charge the overt act as in itself constituting the crime?—No.—It charges that the Prisoner "maliciously and traitorously did *com-* "*pass, imagine, and intend to raise and levy war and* "*rebellion against the King*;"—this is the malice prepense of treason;—and that to fulfil and bring to effect *such traitorous compassings and intentions*, he did, on the day mentioned in the indictment, actually assemble them, and levy war and rebellion against the King. Thus the law, which is made to correct and punish the wickedness of the heart, and not the unconscious deeds of the body, goes up to the fountain of human agency, and arraigns the lurking mischief of the soul, dragging it to light by the evidence of open acts. The hostile *mind* is the crime; and, therefore, unless the matters which are in evidence before you, do beyond all doubt or possibility of error, convince you that the Prisoner is a determined traitor *in his heart*, he is not guilty.

It is the same principle which creates all the va-

rious degrees of homicide, from that which is excusable, to the malignant guilt of murder.—The fact is the same in all,—the death of the man is the imputed crime; but the *intention* makes all the difference; and he who killed him is pronounced a murderer,—a single felon,—or only an unfortunate man, as the circumstances, by which his mind is deciphered to the jury, show it to have been cankered by deliberate wickedness, or stirred up by sudden passions.

Here an immense multitude was, beyond all doubt, assembled on the second of June; but whether HE that assembled them be guilty of high treason, of a high misdemeanour, or only of a breach of the act of King Charles the Second against tumultuous petitioning (if such an act still exists), depends wholly upon the evidence of his purpose in assembling them,—to be gathered by you, and *by you alone*, from the whole tenour of his conduct;—and to be gathered not by *inference* or *probability*, or reasonable *presumption*, but in the words of the act, *provably*;—that is, in the full unerring force of demonstration. You are called upon your oaths to say, *not* whether Lord George Gordon assembled the multitudes in the place charged in the indictment, for that is not denied; but whether it appears by the facts produced in evidence for the Crown, when confronted with the proofs which we have laid before you, that he assembled them *in hostile array, and with a hostile mind, to take the*

laws into his own hands by main force, and to dissolve the constitution of the government, unless his petition should be listened to by Parliament.

That it is *your* exclusive province to determine. The Court can only tell you what acts the law, in its general theory, holds to be high treason, on the general assumption, that such acts proceed from traitorous purposes: but they must leave it to *your* decision, and to *yours* alone, whether the acts proved appear, in the present instance, under all the circumstances, to have arisen from the causes which form the essence of this high crime.

Gentlemen, you have now heard the law of treason; first in the abstract, and secondly as it applies to the general features of the case: and you have heard it with as much sincerity as if I had addressed you upon my oath from the bench where the Judges sit. I declare to you solemnly, in the presence of that great Being, at whose bar we must all hereafter appear, that I have used no one art of an advocate, but have acted the plain unaffected part of a Christian man, instructing the consciences of his fellow-citizens to do justice. If I have deceived you on the subject, I am myself deceived;—and if I am misled through ignorance, my ignorance is incurable, for I have spared no pains to understand it.

I am not stiff in opinions; but before I change any one of those that I have given you to-day, I must see some direct monument of justice that con-

tradicts them: for the law of England pays no respect to theories, however ingenious, or to authors, however wise; and therefore, unless you hear me refuted by a series of *direct precedents*, and not by vague doctrine, if you wish to sleep in peace, *follow me.*

And now the most important part of our task begins, namely, the application of the evidence to the doctrines I have laid down; for trial is nothing more, than the reference of facts to a certain rule of action, and a long recapitulation of them only serves to distract and perplex the memory, without enlightening the judgment, unless the great standard principle by which they are to be measured is fixed, and rooted in the mind. When that is done (which I am confident has been done by you), every thing worthy of observation falls naturally into its place, and the result is safe and certain.

Gentlemen, it is already in proof before you (indeed it is now a matter of history), that an act of Parliament passed in the session of 1778, for the repeal of certain restrictions, which the policy of our ancestors had imposed upon the Roman Catholic religion, to prevent its extension, and to render its limited toleration harmless;—restrictions, imposed *not* because our ancestors took upon them to pronounce that faith to be offensive to God, but because it was incompatible with good faith to man;—being utterly inconsistent with allegiance to a Protestant government, from their oaths and obligations,

to which it gave them not only a release, but a crown of glory, as the reward of treachery and treason.

It was indeed with astonishment, that I heard the Attorney General stigmatize those wise regulations of our patriot ancestors with the title of factious and cruel impositions on the consciences and liberties of their fellow-citizens.—Gentlemen, they were *at the time* wise and salutary regulations ;—regulations to which this country owes its freedom, and His Majesty his crown ;—a crown which he wears under the strict entail of professing and protecting that religion which they were made to repress ;—and which I know my noble friend at the bar joins with me, and with all good men, in wishing, that he and his posterity may wear for ever.

It is not my purpose to recall to your minds the fatal effects, which bigotry has in former days produced in this island. I will not follow the example the Crown has set me, by making an attack on your passions, on subjects foreign to the object before you ;—I will not call your attention from those flames, kindled by a villanous banditti (which they have thought fit, in defiance of evidence, to introduce), by bringing before your eyes the more cruel flames, in which the bodies of our expiring, meek, patient, Christian fathers, were little more than a century ago consuming in Smithfield;—I will not call up from the graves of martyrs all the precious holy blood that has been spilt in this land

to save its established government and its reformed religion, from the secret villany, and the open force of Papists;—the cause does not stand in need even of such honest arts, and I feel my heart too big, voluntarily to recite such scenes, when I reflect that some of my own, and my best and dearest progenitors, from whom I glory to be descended, ended their innocent lives in prisons and in exile, *only because they were Protestants.*

Gentlemen, whether the great lights of science and of commerce, which since those disgraceful times have illuminated Europe, may, by dispelling these shocking prejudices, have rendered the Papists of this day as safe and trusty subjects as those, who conform to the national religion established by law, I shall not take upon me to determine;—it is wholly unconnected with the present inquiry:—we are not trying a question either of divinity, or civil policy; and I shall therefore not enter at all into the motives or merits of the act, that produced the Protestant petition to Parliament: it was certainly introduced by persons who cannot be named by any good citizen without affection and respect: but this I will say, without fear of contradiction, that it was sudden and unexpected;—that it passed with uncommon precipitation, considering the magnitude of the object;—that it underwent no discussion;—and that the heads of the church, the constitutional guardians of the national religion, were never consulted upon it.—Under such circumstances

it is no wonder, that many sincere Protestants were alarmed; and they had a right to spread their apprehensions; it is the privilege and *the duty* of all the subjects of England to watch over their religious and civil liberties, and to approach either their representatives or the Throne with their fears and their complaints,—a privilege which has been bought with the dearest blood of our ancestors, and which is confirmed to us by law, as our ancient birthright and inheritance.

Soon after the repeal of the act, the Protestant Association began, and from small beginnings extended over England and Scotland. A deed of association was signed, *by all legal means* to oppose the growth of Popery; and which of the advocates for the Crown will stand up, and say, that such an union was illegal? Their union was perfectly constitutional;—there was no obligation of secrecy;—their transactions were all public;—a committee was appointed for regularity and correspondence;—and circular letters were sent to all the dignitaries of the church, inviting them to join with them in the protection of the national religion.

All this happened before Lord George Gordon was a member of, or the most distantly connected with it; for it was not till November 1779, that the London Association made him an offer of their chair, by an unanimous resolution communicated to him, unsought and unexpected, in a public letter signed by the secretary in the name of the whole body;

and from that day to the day he was committed to the Tower, I will lead him by the hand in your view, that you may see there is no blame in him. Though all his behaviour was unreserved and public, and though watched by wicked men for purposes of vengeance, the Crown has totally failed in giving it such a context, as can justify, in the mind of any reasonable man, the conclusion it seeks to establish.

This will fully appear hereafter; but let us first attend to the evidence on the part of the Crown.

The first witness to support this prosecution is,

William Hay—a bankrupt in *fortune*, he acknowledged himself to be, and I am afraid he is a bankrupt in *conscience*. Such a scene of impudent, ridiculous inconsistency, would have utterly destroyed his credibility, in the most trifling civil suit; and I am, therefore, almost ashamed to remind you of his evidence, when I reflect that you will never suffer it to glance across your minds on this solemn occasion.

This man, whom I may now, without offence or slander, point out to you as a dark Popish spy, who attended the meetings of the London Association, to pervert their harmless purposes, conscious that the discovery of his character would invalidate all his testimony, endeavoured at first to conceal the activity of his zeal, by denying that he had seen any of the destructive scenes imputed to the Protestants; yet almost in the same breath it came out, by his own confession, that there was hardly a place, public or private, where riot had erected her

standard, in which he had not been; nor a house, prison, or chapel, that was destroyed, to the demolition of which he had not been a witness. He was at Newgate, the Fleet, at Langdale's, and at Coleman Street;—at the Sardinian Ambassador's, and in Great Queen Street, Lincoln's Inn Fields. What took him to Coachmakers' Hall?—He went there, as he told us, to watch their proceedings, because he expected no good from them; and to justify his prophecy of evil, he said, on his examination by the Crown, that as early as December he had heard some alarming republican language. What language did he remember?—"Why, that the Lord Advocate of Scotland was called only HARRY DUNDAS." Finding this too ridiculous for so grave an occasion, he endeavoured to put some words about the breach of the King's coronation oath into the Prisoner's mouth, as proceeding from himself; which it is notorious he read out of an old Scotch book, published near a century ago, on the abdication of King James the Second.

Attend to his cross-examination: He was *sure* he had seen Lord George Gordon at Greenwood's room in January; but when Mr. Kenyon, who knew Lord George had *never* been there, advised him to recollect himself, he desired to consult his notes.—First, he is positively sure, from his memory, that he had seen him there: then he says he cannot trust his memory without referring to his papers;—on looking at them, they contradict him;

and he then confesses, that he *never* saw Lord George Gordon at Greenwood's room in January, when his note was taken, *nor at any other time.* But *why* did he take notes?—He said it was, because he foresaw what would happen.—How fortunate the Crown is, Gentlemen, to have such friends to collect evidence by anticipation! *When* did he begin to take notes? —He said on the 21st of February, which was the *first* time, he had been alarmed at what he had seen and heard, although not a minute before he had been reading a note taken at Greenwood's room in *January*, and had sworn that he attended their meetings, from apprehensions of consequences, as early as *December.*

Mr. Kenyon, who now saw him bewildered in a maze of falsehood, and suspecting his notes to have been a villanous fabrication to give the show of correctness to his evidence, attacked him with a shrewdness for which he was wholly unprepared. You remember the witness had said, that he always took notes when he attended any meetings where he expected their deliberations might be attended with dangerous consequences. "*Give me one instance,*" says Mr. Kenyon, "*in the whole course of your* "*life, where you ever took notes before.*" *Poor Mr. Hay was thunderstruck*;—the sweat ran down his face, and his countenance bespoke despair,—not recollection: "Sir, I must have an instance; tell "me when and where?" Gentlemen, it was now too late; *some* instance he was obliged to give, and,

as it was evident to every body that he had one still to choose, I think he might have chosen a better. *He had taken notes at the General Assembly of the church of Scotland six and twenty years before.* What! did he apprehend dangerous consequences from the deliberations of the grave elders of the Kirk?—Were THEY levying war against the King? At last, when he is called upon to say to whom he communicated the intelligence he had collected, the spy stood confessed indeed: at first he refused to tell, saying he was his friend, and that he was not obliged to give him up; and when forced at last to speak, it came out to be *Mr. Butler*, a gentleman universally known, and who, from what I know of him, I may be sure never employed him, or any other spy, because he is a man every way respectable, but who certainly is not only a Papist, but the person who was employed, in all their proceedings, to obtain the late indulgences from Parliament. He said Mr. Butler was his particular friend, yet professed himself ignorant of his religion. I am sure he could not be desired to conceal it;—Mr. Butler makes no secret of his religion;—it is no reproach to any man who lives the life he does; but Mr. Hay thought it of moment to *his own* credit in the cause, that *he himself* might be thought a Protestant, unconnected with Papists, and not a Popish spy.

So ambitious, indeed, was the miscreant of being useful in this odious character, through every stage of the cause, that after staying a little in St. George's

Fields, he ran home to his own house in St. Dunstan's Churchyard, and got upon the leads, where he swore he saw *the very same man*, carrying *the very same flag*, he had seen in the fields. Gentlemen, whether the petitioners employed the same standard-man through the whole course of their peaceable procession is certainly totally immaterial to the cause, but the circumstance is material to show the wickedness of the man. "How," says Mr. Kenyon, "do you know that it was the same person you "saw in the fields?—Was you acquainted with "him?"—"No."—How then?—Why, "he looked "like a brewer's servant." *Like a brewer's servant!* —What, were they not all in their Sunday's clothes? —"Oh! yes, they were all in their Sunday's "clothes." Was the man with the flag then alone in the dress of his trade?—"No."—Then how do you know he was a brewer's servant?—*Poor Mr. Hay—nothing but sweat and confusion again.* At last, after a hesitation, which every body thought would have ended in his running out of Court, he said, he knew him to be a brewer's servant, *because there was something particular in the cut of his coat, the cut of his breeches,* AND THE CUT OF HIS STOCKINGS.

You see, Gentlemen, by what strange means villany is sometimes detected; perhaps he might have escaped from me, but he sunk under that shrewdness and sagacity, which ability, without long habits, does not provide. Gentlemen, you will not, I am sure, forget, whenever you see a man, about whose

apparel there is any thing particular, to set him down for a brewer's servant.

Mr. Hay afterwards went to the lobby of the House of Commons. What took him there?—He thought himself in danger; and therefore, says Mr. Kenyon, you thrust yourself voluntarily into the very centre of danger. *That would not do.*—Then he had a *particular friend*, whom he knew to be in the lobby, and whom he apprehended to be in danger.—"Sir, who was that particular friend?—Out with it:—Give us his name instantly."—*All in confusion again. Not a word to say for himself; and the name of this person, who had the honour of Mr. Hay's friendship, will probably remain a secret for ever.*

It may be asked, are these circumstances material? and the answer is obvious:—They are material; because, when you see a witness running into every hole and corner of falsehood, and as fast as he is made to bolt out of one, taking cover in another, you will never give credit to what that man relates, as to any possible matter which is to affect the life or reputation of a fellow-citizen accused before you. God forbid that you should.—I might therefore get rid of this wretch altogether, without making a single remark on that part of his testimony, which bears upon the issue you are trying; but the Crown shall have the full benefit of it all;—I will defraud it of nothing he has said. Notwithstanding all his folly and wickedness, let us for the present take it to be true, and see what it amounts to. What is it

he states to have passed at Coachmakers' Hall?—That Lord George Gordon desired the multitude to behave with unanimity and firmness, as the Scotch had done. Gentlemen, there is no manner of doubt that the Scotch behaved with unanimity and firmness, in resisting the relaxation of the penal laws against Papists, and that by that unanimity and firmness they succeeded;—but it was by the *constitutional* unanimity and firmness of the great body of the people of Scotland, whose example Lord George Gordon recommended, and not by the *riots and burning*, which they attempted to prove had been committed in Edinburgh in 1778.

I will tell you myself, Gentlemen, as one of the people of Scotland, that there then existed, and still exist, eighty-five societies of Protestants, who have been, and still are, uniformly firm in opposing every change in that system of laws, established to secure the Revolution, and Parliament gave way in Scotland to their united voice, and not to the firebrands of the rabble. It is the duty of Parliament to listen to the voice of the people;—for they are the servants of the people; and when the constitution of church or state is believed, whether truly or falsely, to be in danger, I hope there never will be wanting men (notwithstanding the proceedings of to-day) to desire the people to persevere and be firm. Gentlemen, has the Crown proved, that the Protestant brethren of the London Association fired the mass-houses in Scotland, or

acted in rebellious opposition to law, so as to entitle it to wrest the Prisoner's expressions into an excitation of rebellion against the state, or of violence against the properties of English Papists, by setting up their firmness as an example?—Certainly not. They have not even proved the naked fact of such violences, though such proof would have called for no resistance, since to make it bear as rebellious advice to the Protestant Association of London, it must have been first shown, that such acts had been perpetrated or encouraged by the Protestant Societies in the North.

Who has dared to say this?—No man — The rabble in Scotland certainly did that which has since been done by the rabble in England, to the disgrace and reproach of both countries; but in neither country was there found one man of character or condition, of any description, who abetted such enormities, nor any man, high or low, of any of the Associated Protestants here or there, who were either convicted, tried, or taken on suspicion.

As to what this man heard, on the 29th of May, it was nothing more than the proposition of going up in a body to St. George's Fields, to consider how the petition should be presented, with the same exhortations to firmness as before. The resolution made on the motion has been read, and when I come to state the evidence on the part of my noble friend, I will show you the impossibility of supporting any criminal inference, from what Mr. Hay

afterwards puts in his mouth in the lobby, even taking it to be true. I wish here to be accurate [*looks on a card on which he had taken down his words*]; He says: "*Lord George desired them to continue* "*steadfastly to adhere to so good a cause as theirs* "*was;—promised to persevere in it himself, and* "*hoped, though there was little expectation at present* "*from the House of Commons, that they would meet* "*with redress from their* MILD AND GRACIOUS SO- "VEREIGN, *who, no doubt, would recommend it to* "*his Ministers to repeal it.*" This was all he heard, and I will show you how this wicked man himself, (if any belief is to be given to him,) entirely overturns and brings to the ground the evidence of Mr. Bowen, on which the Crown rests singly for the proof of words which are more difficult to explain. Gentlemen, was this the language of rebellion?—If a multitude were at the gates of the House of Commons, to command and insist on a repeal of this law,—why encourage their hopes, by reminding them that they had a mild and gracious Sovereign?—If war was levying against him, there was no occasion for his mildness and graciousness. If he had said, *Be firm and persevere, we shall meet with redress from the* PRUDENCE of the Sovereign, it might have borne a different construction; because, whether he was gracious or severe, his prudence might lead him to submit to the necessity of the times. The words sworn to were, therefore, perfectly clear and unambiguous—*Persevere in your*

zeal and supplications, and you will meet with redress from a mild and gracious King, who will recommend it to his Minister to repeal it. Good God! if they were to wait till the King, whether from benevolence or fear, should direct his Minister to influence the proceedings of Parliament, how does it square with the charge of instant coercion or intimidation of the House of Commons?—If the multitude were assembled with the premeditated design of producing immediate repeal by terror or arms, is it possible to suppose, that their leader would desire them to be quiet, and refer them to those qualities of the prince, which, however eminently they might belong to him, never could be exerted on subjects in rebellion to his authority?—In what a labyrinth of nonsense and contradiction do men involve themselves, when, forsaking the rules of evidence, they would draw conclusions from words in contradiction to language, and in defiance of common sense?

The next witness that is called to you by the Crown is Mr. Metcalf. He was not in the lobby, but speaks only to the meeting in Coachmakers' Hall, on the 29th of May, and in St. George's Fields. He says, that at the former, Lord George reminded them, that the Scotch had succeeded by their unanimity,—and hoped that no one, who had signed the petition, would be ashamed or afraid to show himself in the cause;—that he was ready to go to the gallows for it;—that he would not present the petition of a lukewarm people;—that he desired them to come

to St. George's Fields, distinguished with blue cockades, and that they should be marshalled in four divisions. Then he speaks to having seen them in the fields, in the order which has been prescribed; and Lord George Gordon in a coach, surrounded with a vast concourse of people, with blue ribands, forming like soldiers, but was not near enough to hear, whether the Prisoner spoke to them or not. Such is Mr. Metcalf's evidence,—and after the attention you have honoured me with, and which I shall have occasion so often to ask again on the same subject, I shall trouble you with but one observation, viz. That it cannot, without absurdity, be supposed, that if the assembly at Coachmakers' Hall had been such conspirators, as they are represented, their doors would have been open to strangers, like this witness, to come in to report their proceedings.

The next witness is Mr. ANSTRUTHER, who speaks to the language and deportment of the noble Prisoner, both at Coachmakers' Hall on the 29th of May, and afterwards on the 2d of June, in the lobby of the House of Commons. It will be granted to me, I am sure, even by the advocates of the Crown, that this gentleman, not only from the clearness and consistency of his testimony, but from his rank and character in the world, is infinitely more worthy of credit than Mr. Hay, who went before him; and if the circumstances of irritation and confusion under which the Rev. Mr. Bowen confessed himself to have heard and seen, what he told you he

heard and saw, I may likewise assert, without any offence to the Reverend Gentleman, and without drawing any parallel between their credits, that where their accounts of this transaction differ, the preference is due to the former. Mr. Anstruther very properly prefaced his evidence with this declaration: "*I do not mean to speak accurately to words*; "*it is impossible to recollect them at this distance of* "*time.*" I believe I have used his very expression, and such expression it well became him to use in a *case of blood.* But WORDS, even if they could be accurately remembered, are to be admitted with *great reserve and caution,* when the purpose of the speaker is to be measured by them. They are transient and fleeting; frequently the effect of a sudden transport,—easily misunderstood,—and often unconsciously misrepresented. It may be the fate of the most innocent language, to appear ambiguous, or even malignant, when related in mutilated detached passages, by people to whom it is not addressed, and who know nothing of the previous design, either of the speaker, or of those to whom he spoke. Mr. Anstruther says, that he heard Lord George Gordon desire the petitioners to meet him on the Friday following in St. George's Fields, and that if there were fewer than twenty thousand people, he would not present the petition, as it would not be of consequence enough;—and that he recommended to them the example of the Scotch, who, by their firmness, had carried their point.

Gentlemen, I have already admitted that they did by firmness carry it. But has Mr. Anstruther attempted to state any one expression, that fell from the Prisoner, to justify the positive unerring conclusion, or even the presumption, that the *firmness* of the Scotch Protestants, by which the point was carried in Scotland, *was the resistance and riots of the rabble?*—No, Gentlemen; he singly states the words, as he heard them in the Hall, on the 29th, and all that he afterwards speaks to in the lobby repels so harsh and dangerous a construction. The words sworn to at Coachmakers' Hall are, "that he re-"commended temperance and firmness."—Gentlemen, if his motives are to be judged by words, for Heaven's sake let these words carry their popular meaning in language. Is it to be presumed, without proof, that a man means *one* thing, because he says *another?*—Does the exhortation of temperance and firmness apply most naturally, to the constitutional resistance of the Protestants of Scotland, or to the outrages of ruffians who pulled down the houses of their neighbours?—Is it possible, with decency, to say in a court of justice, that the recommendation of temperance is the excitation to villany and frenzy? But the words, it seems, are to be construed, not from their own signification, but from that which follows them, viz. *by that the Scotch carried their point.* Gentlemen, *Is* it in evidence before you, that *by rebellion* the Scotch carried their point; or that the indulgences to Papists were not extended to Scotland,

because the *rabble* had opposed their extension?—has the Crown authorized either the Court, or its law servants, to tell you so?—Or can it be decently maintained, that Parliament was so weak or infamous, as to yield to a wretched mob of vagabonds at Edinburgh, what it has since refused to the earnest prayers of an hundred thousand Protestants in London?—No, Gentlemen of the Jury, Parliament was not, I hope, so abandoned. But the Ministers knew, that the Protestants in Scotland were, to a man, abhorrent of that law; and though they never held out resistance, if Government should be disposed to cram it down their throats by force, yet such a violence to the united sentiments of a whole people appeared to be a measure so obnoxious, so dangerous, and withal so unreasonable, that it was wisely and judiciously dropped, to satisfy the general wishes of the nation, and not to avert the vengeance of those low incendiaries, whose misdeeds have rather been talked of than proved.

Thus, Gentlemen, the exculpation of Lord George's conduct, on the 29th of May, is sufficiently established by the very evidence, on which the Crown asks you to convict him:—since in recommending *temperance and firmness after the example of Scotland*, you cannot be justified in pronouncing, that he meant more than the firmness of the grave and respectable people in that country, to whose constitutional firmness the Legislature had before acceded, instead of branding it with the title of rebel-

lion; and who, in my mind, deserve thanks from the King, for temperately and firmly resisting every innovation, which they conceived to be dangerous to the national religion, independently of which His Majesty (without a new limitation by Parliament) has no more title to the Crown than I have.

Such, Gentlemen, is the whole amount of all my noble friend's previous communication with the petitioners, whom he afterwards assembled to consider, how their petition should be presented. This is all, not only that men of credit can tell you on the part of the prosecution, but all that even the worst vagabond, who ever appeared in a Court,—the very scum of the earth,—thought himself safe in saying, upon oath, on the present occasion. Indeed, Gentlemen, when I consider my noble friend's situation, his open, unreserved temper, and his warm and animated zeal for a cause, which rendered him obnoxious to so many wicked men;—speaking daily and publicly to mixed multitudes of friends and foes, on a subject which affected his passions, I confess, I am astonished that no other expressions, than those in evidence before you, have found their way into this Court. That they have not found their way is surely a most satisfactory proof that there was nothing in his heart, which even youthful zeal could magnify into guilt, or that want of caution could betray.

Gentlemen, Mr. Anstruther's evidence, when he speaks of the lobby of the House of Commons, is very much to be attended to. He says, "*I saw*

"*Lord George leaning over the gallery,*" which position, joined with what he mentioned of his talking with the Chaplain, marks the time, and casts a strong doubt on Bowen's testimony, which you will find stands, in this only material part of it, single and unsupported. "*I then heard him,*" continues Mr. Anstruther, "*tell them, they had been called a "mob, in the House, and that peace officers had been "sent to disperse them,*—peaceable *petitioners: but "that by steadiness and firmness they might carry their "point; as he had no doubt His Majesty, who was a "*gracious *prince, would send to his Ministers to repeal "the act, when he heard his subjects were coming up "for miles round, and* wishing *its repeal.*" How coming up?—In rebellion and arms to compel it?—No!—All is still put on the *graciousness* of the Sovereign, in listening to the unanimous wishes of his people. If the multitude then assembled had been brought together to intimidate the House by their firmness, or to coerce it by their numbers, it was ridiculous to look forward to the King's influence over it, when the collection of future multitudes should induce him to employ it. The expressions were therefore quite unambiguous, nor could malice itself have suggested another construction of them, were it not for the fact, that the House was at that time surrounded, not by the petitioners, whom the noble Prisoner had assembled, but by a mob who had mixed with them, and who therefore, when addressed by him, were instantly set down as his fol-

lowers. He thought he was addressing the sober members of the Association, who, by steadiness and perseverance, could understand nothing more than perseverance in that conduct, he had antecedently prescribed, as steadiness signifies an uniformity, not a change of conduct; and I defy the Crown to find out a single expression, from the day he took the chair of the Association, to the day I am speaking of, that justifies any other construction of steadiness and firmness, than that, which I put upon it before.

What would be the feelings of our venerable ancestors, who framed the statute of treasons to prevent their children being drawn into the snares of death, unless *proveably* convicted by overt acts, if they could hear us disputing, whether it was treason to desire harmless unarmed men to be firm and of good heart, and to trust to the graciousness of their King?

Here Mr. Anstruther closes his evidence, which leads me to Mr. Bowen, who is the only man—*I beseech you, Gentlemen of the Jury, to attend to this circumstance*—Mr. Bowen is the *only* man who has attempted, directly or indirectly, to say, that Lord George Gordon uttered a syllable to the multitude in the lobby, concerning the destruction of the mass-houses in Scotland.—Not one of the Crown's witnesses, not even the wretched abandoned Hay, who was kept, as he said, in the lobby, the whole afternoon, from anxiety for his pretended friend,

has ever glanced at any expression resembling it.—They all finish with the expectation which he held out, from a mild and *gracious* Sovereign. Mr. Bowen ALONE goes on further, and speaks of the successful riots of the Scotch ;—but speaks of them in such a manner, as, so far from conveying the hostile idea, *which he seemed sufficiently desirous to convey*, tends directly to wipe off the dark hints and insinuations, which have been made to supply the place of proof upon that subject,—a subject which should not have been touched on, without the fullest support of evidence, and where nothing but the most unequivocal evidence ought to have been received. He says, his Lordship began, by bidding them be QUIET,—PEACEABLE,—and STEADY—*not steady alone* ;—though if that had been the expression, *singly by itself*, I should not be afraid to meet it ;—but be quiet, *peaceable*, and steady. Gentlemen, I am indifferent what other expressions of dubious interpretation are mixed with these, for you are trying whether my noble friend came to the House of Commons with a decidedly hostile mind ; and as I shall, on the recapitulation of our own evidence, trace him in your view without spot or stain, down to the very moment when the imputed words were spoken, you will hardly forsake the whole innocent context of his behaviour, and torture your inventions to collect the blackest system of guilt, starting up in a moment, without being previously concerted, or afterwards carried into execution.

First, what are the words by which you are to be convinced, that the Legislature was to be frightened into compliance, and to be coerced if terror should fail? "*Be quiet,*—PEACEABLE,—*and steady*;—*You* "*are a good people*;—*Yours is a good cause*:—*His* "*Majesty is a* GRACIOUS *monarch, and when he* "*hears that all his people, ten miles round, are col-* "*lecting, he will send to his Ministers to repeal the* "*act.*" By what rules of construction can such an address to unarmed, defenceless men, be tortured into treasonable guilt? It is impossible to do it without pronouncing, even in the total absence of all proof of fraud or deceit in the speaker, THAT QUIET SIGNIFIES TUMULT AND UPROAR, AND THAT PEACE SIGNIFIES WAR AND REBELLION.

I have before observed, that it was most important for you to remember, that with this exhortation to quiet and confidence in the King, the evidence of all the other witnesses closed; even Mr. Anstruther, who was a long time afterwards in the lobby, heard nothing further; so that if Mr. Bowen had been out of the case altogether, what would the amount have been?—Why simply, that Lord George Gordon having assembled an unarmed, inoffensive multitude in St. George's Fields, to present a petition to Parliament, and finding them becoming tumultuous, to the discontent of Parliament, and the discredit of the cause, desired them not to give it up, but to continue to show their zeal for the legal object in which they were engaged;—to manifest that zeal *quietly and*

peaceably, and not to despair of success; since, though the House was not disposed to listen to it, they had a GRACIOUS Sovereign, who would second the wishes of his people. This is the sum and substance of the whole. They were not, even by any one ambiguous expression, encouraged to trust to their numbers, as sufficient to overawe the House, or to their strength to compel it, nor to the prudence of the state in yielding to necessity,—but to *the indulgence of the King*, in compliance with the wishes of his people. Mr. Bowen however thinks proper to proceed; and I beg that you will particularly attend to the sequel of his evidence. He stands *single*, in all the rest that he says, which might entitle me to ask you absolutely to reject it;—but I have no objection to your believing every word of it *if you can*; because, if inconsistencies prove any thing, they prove, that there was nothing of that deliberation in the Prisoner's expressions which can justify the inference of guilt. *I mean to be correct as to his words* [looks at his words, which he had taken down on a card]. He says, "*That Lord George told the people, "that an attempt had been made to introduce the bill "into Scotland, and that they had no redress till the "mass-houses were pulled down. That Lord Wey-"mouth then sent official assurances that it should "not be extended to them.*" Gentlemen, why is Mr. Bowen called by the Crown to tell you this? The reason is plain,—because the Crown, conscious that it could make no case of treason from the rest of the

evidence, in the sober judgment of law,—aware that it had proved no purpose or act of force against the House of Commons, to give countenance to the accusation, much less to warrant a conviction, found it necessary to hold up the noble Prisoner, as the wicked and cruel author of all those calamities, in which every man's passions might be supposed to come in to assist his judgment to decide. They therefore made him speak in enigmas to the multitude; not telling them *to do* mischief in order to succeed, but that *by* mischief in Scotland success had been obtained.

But were the mischiefs themselves, that did happen here, of a sort to support such conclusion?—Can any man living, for instance, believe that Lord George Gordon could possibly have excited the mob to destroy the house of that great and venerable magistrate, who has presided so long in this high tribunal, that the oldest of us do not remember him with any other impression, than the awful form and figure of justice:—a magistrate, who had always been the friend of the Protestant Dissenters, against the ill-timed jealousies of the establishment—his countryman too—and, without adverting to the partiality not unjustly imputed to men of that country, a man of whom any country might be proud?—No, Gentlemen, it is not credible, that a man of noble birth, and liberal education (unless agitated by the most implacable personal resentment, which is not im-

puted to the Prisoner), could possibly consent to the burning of the house of Lord Mansfield *.

If Mr. Bowen therefore had ended here, I can hardly conceive such a construction could be decently hazarded, consistent with the testimony of the witnesses we have called; how much less, when, after the dark insinuations which such expressions might otherwise have been argued to convey, the very same person, on whose veracity or memory they are only to be believed, and who must be credited or discredited *in toto*, takes out the sting himself, by giving them such an immediate context and conclusion, as renders the proposition ridiculous, which his evidence is brought forward to establish; for he says, that Lord George Gordon instantly afterwards addressed himself thus:—*Beware of evil-minded persons, who may mix among you and do mischief, the blame of which will be imputed to you.*

Gentlemen, if you reflect on the slander, which I told you fell upon the Protestants in Scotland by the acts of the rabble there, I am sure you will see the words are capable of an easy explanation. But as Mr. Bowen concluded with telling you, that he heard them in the midst of noise and confusion, and as I can only take them from *him*, I shall not make an attempt to collect them into one consistent discourse, so as to give them a decided mean-

* The house of this venerable nobleman in Bloomsbury Square was one of the first that was attacked by the mob.

ing in favour of my client, because I have repeatedly told you, that words, imperfectly heard and partially related, cannot be so reconciled. But this I will say—that he must be a *ruffian* and not a lawyer, who would dare to tell an English jury, that such ambiguous words, hemmed closely in between others not only innocent, but meritorious, are to be adopted to constitute guilt, by rejecting both introduction and sequel, with which they are absolutely irreconcilable and inconsistent: for if ambiguous words, when coupled with actions, decipher the mind of the actor, so as to establish the presumption of guilt, will not such as are plainly innocent and unambiguous go as far to repel such presumption?—Is innocence more difficult of proof than the most malignant wickedness?—Gentlemen, I see your minds revolt at such shocking propositions. I beseech you to forgive me; I am afraid that my zeal has led me to offer observations, which I ought in justice to have believed every honest mind would suggest to itself with pain and abhorrence, without being illustrated and enforced.

I now come more minutely to the evidence on the part of the Prisoner.

I before told you, that it was not till November 1779, when the Protestant Association was already fully established, that Lord George Gordon was elected president by the unanimous voice of the whole body, unlooked for and unsolicited; and it is surely not an immaterial circumstance, that at the

very first meeting where his Lordship presided, a dutiful and respectful petition, the same which was afterwards presented to Parliament, was read and approved of;—a petition, which so far from containing any thing threatening or offensive, conveyed *not a very oblique reflection* upon the behaviour of the people in Scotland: taking notice that as England and that country were now ONE, and as official assurances had been given that the law should not pass THERE, they hoped the *peaceable* and *constitutional deportment of the English* Protestants would entitle them to the approbation of Parliament.

It appears by the evidence of Mr. Erasmus Middleton, a very respectable clergyman, and one of the committee of the Association, that a meeting had been held on the 4th of May, at which Lord George was not present:—That at that meeting a motion had been made for going up with the petition in a body, but which not being regularly put from the chair, no resolution was come to upon it:—and that it was likewise agreed on, but in the same irregular manner, that there should be no other public meeting, previous to the presenting the petition;—that this last resolution occasioned great discontent, and that Lord George was applied to by a large and respectable number of the Association to call another meeting, to consider of the most prudent and respectful method of presenting their petition: but it appears that, before he complied with their request, he consulted with the committee on the propriety of compliance, who all

agreeing to it, except the secretary, his Lordship advertised the meeting, which was afterwards held on the 29th of May. The meeting was therefore the act of the *whole* Association; and as to the original difference between my noble friend and the committee, on the expediency of the measure, it is totally immaterial; since Mr. Middleton, who was one of the number who differed from him on that subject (and whose evidence is therefore infinitely more to be relied on), told you, that his whole deportment was so clear and unequivocal, as to entitle him to assure you, on his most solemn oath, that he in his conscience believed his views were perfectly constitutional and pure. This most respectable clergyman further swears, that he attended all the previous meetings of the society, from the day the Prisoner became president to the day in question, and that knowing they were objects of much jealousy and malice, he watched his behaviour with anxiety, lest his zeal should furnish matter for misrepresentation;—but that he never heard an expression escape him which marked a disposition to violate the duty and subordination of a subject, or which could lead any man to believe, that his objects were different from the avowed and legal objects of the Association. We could have examined thousands to the same fact, for, as I told you when I began to speak, I was obliged to leave my place to disencumber myself from their names.

This evidence of Mr. Middleton's, as to the 29th

of May, must, I should think, convince every man how dangerous and unjust it is, in witnesses, however perfect their memories, or however great their veracity, to come into a criminal court where a man is standing for his life or death, retailing scraps of sentences, which they had heard by thrusting themselves, from curiosity, into places where their business did not lead them;—ignorant of the views and tempers of both speakers and hearers, attending only to a part, and, perhaps innocently, misrepresenting that part, from not having heard the whole.

The witnesses for the Crown all tell you, that Lord George said he would not go up with the petition unless he was attended by 20,000 people who had signed it: and there they think proper to stop, as if he had said nothing further; leaving you to say to yourselves—What possible purpose could he have in assembling such a multitude, on the very day the House was to receive the petition?—Why should he urge it, when the committee had before thought it inexpedient?—And why should he refuse to present it, unless he was so attended? Hear what Mr. Middleton says;——He tells you, that my noble friend informed the petitioners, that if it was decided they were *not* to attend to consider how their petition should be presented, he would with the greatest pleasure go up with it *alone*; but that, if it was resolved they should attend it in person, he expected twenty thousand at the least should meet him in St. George's Fields, for that otherwise the petition would

be considered as a forgery; it having been thrown out in the House and elsewhere, that the repeal of the bill was not the serious wish of the people at large, and that the petition was a mere list of names in parchment, and not of men in sentiment. Mr. Middleton added, That Lord George adverted to the same objections having been made to many other petitions, and he therefore expressed an anxiety to show Parliament, how many were actually interested in its success, which he reasonably thought would be a strong inducement to the House to listen to it. The language imputed to him falls in most naturally with this purpose: "*I wish Parliament to see who, "and what you are; dress yourselves in your best "clothes*"—which Mr. Hay (who, I suppose, had been reading the indictment) thought it would be better to call, ARRAY YOURSELVES. He desired, that not a stick should be seen among them, and that if any man insulted another, or was guilty of any breach of the peace, he was to be given up to the magistrates. Mr. Attorney General, to persuade you that this was all colour and deceit, says, How was a magistrate to face forty thousand men?—How were offenders in such a multitude to be amenable to the civil power?—What a shameful perversion of a plain peaceable purpose! To be sure, if the multitude had been assembled to *resist* the magistrate, offenders could not be secured. But *they themselves* were ordered to apprehend all offenders amongst them, and to deliver them up to justice.—*They them-*

selves were to surrender their fellows to civil authority if they offended.

But it seems that Lord George ought to have *foreseen* that so great a multitude could not be collected without mischief. Gentlemen, we are not trying whether he might or ought to have *foreseen* mischief, but whether he wickedly and traitorously PRECONCERTED AND DESIGNED IT. But if *he* be an object of censure for not foreseeing it, what shall we say to GOVERNMENT, that took no step to prevent it,—that issued no proclamation, warning the people of the danger and illegality of such an assembly?—If a peaceable multitude, with a petition in their hands, be an army,—and if the noise and confusion inseparable from numbers, though without violence or the purpose of violence, constitute war,—what shall be said of that GOVERNMENT, which remained from Tuesday to Friday, knowing that an army was collecting to levy war by public advertisement, yet had not a single soldier,—no, nor even a constable to protect the state?

Gentlemen, I come forth to do that for Government, which its own servant, the Attorney General, has not done.—I come forth to rescue it from the eternal infamy, which would fall upon its head, if the language of its own advocate were to be believed. But Government has an unanswerable defence. It neither *did* nor *could possibly* enter into the head of any man in authority to prophesy—human wisdom could not divine, that wicked and de-

sperate men, taking advantage of the occasion, which, perhaps, an imprudent zeal for religion had produced, would dishonour the cause of all religions, by the disgraceful acts which followed.

Why then is it to be said, that Lord George Gordon is a traitor, who, without proof of any hostile purpose to the government of his country, only did not foresee,—what nobody else foresaw,—what those people, whose business it is to foresee every danger that threatens the state, and to avert it by the interference of magistracy, though they could not but read the advertisement, neither did, nor could possibly apprehend?

How are these observations attempted to be answered? Only by asserting without evidence, or even reasonable argument, that all this was colour and deceit. Gentlemen, I again say, that it is scandalous and reproachful, and not to be justified by any duty, which can possibly belong to an advocate at the bar of an English court of justice, to declaim, without any proof, or attempt of proof, that all a man's expressions,—however peaceable,—however quiet,—however constitutional,—however loyal,—are all fraud and villainy. Look, Gentlemen, to the issues of life, which I before called the evidence of Heaven—I call them so still—Truly may I call them so—when out of a book compiled by the Crown from the petition in the House of Commons, and containing the names of all who signed it, and which was printed in order to prevent any of that

number being summoned upon the jury to try this indictment, NOT ONE CRIMINAL, OR EVEN A SUSPECTED NAME IS TO BE FOUND AMONGST THIS DEFAMED HOST OF PETITIONERS.

After this, Gentlemen, I think the Crown ought in decency to be silent. I see the effect this circumstance has upon you, and I know I am warranted in my assertion of the fact. If I am not, why did not the Attorney General produce the record of some convictions, and compare it with the list?—I thank them therefore for the precious compilation, which, though they did not produce, they cannot stand up and deny.

Solomon says, "*O that my adversary would write "a book!*"—so say I.—My adversary has written a book, and out of it I am entitled to pronounce, that it cannot again be decently asserted, that Lord George Gordon, in exhorting an innocent and unimpeached multitude to be peaceable and quiet, was exciting them to violence against the state.

What is the evidence then, on which this connexion with the mob is to be proved?—*Only that they had blue cockades.*—Are you or am I answerable for every man who wears a blue cockade?—If a man commits murder in my livery, or in yours, without command, counsel, or consent, is the murder ours?—In all *cumulative,* constructive treasons you are to judge from the tenour of a man's behaviour, not from crooked and disjointed PARTS of it. *Nemo repente fuit turpissimus.*—No man can pos-

sibly be guilty of *this* crime by a *sudden* impulse of the mind, as he may of some others; and certainly Lord George Gordon stands upon the evidence at Coachmakers' Hall as pure and white as snow. He stands so upon the evidence of a man, who had differed with him as to the expediency of his conduct, yet who swears that, from the time he took the chair till the period which is the subject of inquiry, there was no blame in him.

You therefore are bound as Christian men to believe, that, when he came to St. George's Fields that morning, he did not come there with *the hostile purpose* of repealing a law by rebellion.

But still it seems all his behaviour at Coachmakers' Hall was colour and deceit. Let us see, therefore, whether this body of men, when assembled, answered the description of that, which I have stated to be the purpose of him who assembled them. Were they a multitude arrayed for terror or force?—On the contrary, you have heard, upon the evidence of men, whose veracity is not to be impeached, that they were sober, decent, quiet, peaceable tradesmen;—that they were all of the better sort;—all well dressed, and well behaved;—and that there was not a man among them, who had any one weapon offensive or defensive. Sir Philip Jennings Clerke tells you, he went into the Fields; that he drove through them, talked to many individuals among them, who all told him that it was not their wish to persecute the Papists, but that they were alarmed at

the progress of their religion from their schools. Sir Philip further told you, that he never saw a more peaceable multitude in his life; and it appears upon the oaths of all who were present, that Lord George Gordon went round among them, desiring peace and quietness.

Mark his conduct when he heard from Mr. Evans, that a low riotous set of people were assembled in Palace Yard. Mr. Evans being a member of the Protestant Association, and being desirous that nothing bad might happen from the assembly, went in his carriage with Mr. Spinage to St. George's Fields, to inform Lord George that there were such people assembled (probably Papists) who were determined to do mischief. The moment he told him of what he heard, whatever his original plan might have been, he instantly changed it on seeing the impropriety of it. Do you intend, said Mr. Evans, to carry up all these men with the petition to the House of Commons?—O no! no! not by any means—I do not mean to carry them all up. Will you give me leave, said Mr. Evans, to go round to the different divisions, and tell the people it is not your Lordship's purpose? He answered—By all means; and Mr. Evans accordingly went, but it was impossible to guide such a number of people, peaceable as they were. They were all desirous to go forward, and Lord George was at last obliged to leave the Fields exhausted with heat and fatigue, beseeching them to be peaceable and quiet. Mrs. Whiting-

ham set him down at the House of Commons; and at the very time that he thus left them in perfect harmony and good order, it appears by the evidence of Sir Philip Jennings Clerke, that Palace Yard was in an uproar, filled with mischievous boys and the lowest dregs of the people.

Gentlemen, I have all along told you, that the Crown was aware that it had no case of treason, without connecting the noble Prisoner with consequences, which it was in some luck to find advocates to state, without proof to support it. I can only speak for myself; that small as my chance is *(as times go)* of ever arriving at high office, I would not accept of it on the terms of being obliged to produce against a fellow-citizen, that which I have been witness to this day: for Mr. Attorney General perfectly well knew the innocent and laudable motive, with which the protection was given, that he exhibited as an evidence of guilt: yet it was produced to insinuate, that Lord George Gordon, knowing himself to be the ruler of those villains, set himself up as a saviour from their fury. We called Lord Stormont to explain this matter to you, who told you that Lord George Gordon came to Buckingham House, and begged to see the King, saying, he might be of great use in quelling the riots; and can there be on earth a greater proof of conscious innocence? for if he had been the wicked mover of them, would he have gone to the King to have confessed it, by offering to recall his followers, from the mischiefs

he had provoked ?—No ! But since, notwithstanding a public protest issued by himself and the Association, reviling the authors of mischief, the Protestant cause was still made the pretext, he thought his public exertions might be useful, as they might tend to remove the prejudices which wicked men had diffused. The King thought so likewise, and therefore (as appears by Lord Stormont) refused to see Lord George till he had given the test of his loyalty by such exertions. But sure I am, our gracious Sovereign meant no trap for innocence, nor ever recommended it as such to his servants.

Lord George's language was simply this : " The " multitude pretend to be perpetrating these acts, " under the authority of the Protestant petition ; " I assure Your Majesty they are not the Protestant " Association, and I shall be glad to be of any ser- " vice in suppressing them." I say, by God, that man is a ruffian, who shall, after this, presume to build upon such honest, artless conduct as an evidence of guilt. Gentlemen, if Lord George Gordon had been guilty of high treason (as is assumed today) *in the face of the whole Parliament*, how are all its members to defend themselves, from the misprision of suffering such a person to go at large and to approach his Sovereign ?—The man who conceals the perpetration of treason, is himself a traitor ; but they are all perfectly safe, for nobody thought of treason till fears arising from another quarter bewildered their senses. The King, there-

fore, and his servants, very wisely accepted his promise of assistance, and he flew with honest zeal to fulfil it. Sir Philip Jennings Clerke tells you, that he made use of every expression, which it was possible for a man in such circumstances to employ. He begged them, for God's sake, to disperse and go home; declared his hope, that the petition would be granted, but that rioting was not the way to effect it. Sir Philip said he felt himself bound, without being particularly asked, to say every thing he could in protection of an injured and innocent man, and repeated again, that there was not an art, which the Prisoner could possibly make use of, that he did not zealously employ;—but that it was all in vain. I began, says he, to tremble for myself, when Lord George read the resolution of the House, which was hostile to them, and said their petition would not be taken into consideration till they were quiet. But did he say, *Therefore go on to burn and destroy?*—On the contrary, he helped to pen that motion, and read it to the multitude, *as one which he himself had approved.* After this he went into the coach with Sheriff Pugh, in the city; and there it was, in the presence of the very magistrate, whom he was assisting to keep the peace, that he *publicly* signed the protection which has been read in evidence against him: although Mr. Fisher, who now stands in my presence, confessed in the Privy Council, that he himself had granted similar protections to various

people—*yet he was dismissed, as having done nothing but his duty.*

This is the plain and simple truth—and for this just obedience to His Majesty's request, do the King's servants come to-day into his Court, where he is supposed in person to sit, to turn that obedience into the crime of high treason, and to ask you to put him to death for it.

Gentlemen, you have now heard, upon the solemn oaths of honest disinterested men, a faithful history of the conduct of Lord George Gordon, from the day that he became a member of the Protestant Association, to the day that he was committed a prisoner to the Tower. And I have no doubt, from the attention with which I have been honoured from the beginning, that you have still kept in your minds the principles, to which I entreated you would apply it, and that you have measured it by that standard.

You have therefore only to look back to the whole of it together;—to reflect on all you have heard concerning him;—to trace him in your recollection through every part of the transaction;—and, considering it with one manly liberal view, to ask your own honest hearts, whether you can say, that this noble and unfortunate youth is a wicked and deliberate traitor, who deserves by your verdict to suffer a shameful and ignominious death, which will stain the ancient honours of his house for ever.

The crime which the Crown would have fixed

upon him is, that he assembled the Protestant Association round the House of Commons, not merely *to influence and persuade Parliament by the earnestness of their supplications*, but actually to coerce it *by hostile rebellious force*—That finding himself disappointed in the success of that coercion, he afterwards incited his followers to abolish the legal indulgences to Papists, which the object of the petition was to repeal, by the burning of their houses of worship, and the destruction of their property, which ended at last in a general attack on the property of all orders of men, religious and civil,—on the public treasures of the nation,—and on the very being of the government.

To support a charge of so atrocious and unnatural a complexion, the laws of the most arbitrary nations would require the most incontrovertible proof. Either the villain must have been taken in the overt act of wickedness, or, if he worked in secret upon others, his guilt must have been brought out by the discovery of a conspiracy, or by the consistent tenour of criminality;—the very worst inquisitor that ever dealt in blood would vindicate the torture by plausibility at least, and by the semblance of truth.

What evidence then will a jury of Englishmen expect, from the servants of the Crown of England, before they deliver up a brother accused before them to ignominy and death?—What proof will their consciences require?—What will their plain and manly understandings accept of?—What does the immemo-

rial custom of their fathers, and the written law of this land, warrant them in demanding?—nothing less, *in any case of blood*, than the clearest and most unequivocal conviction of guilt.—But in *this case* the act has not even trusted to the humanity and justice of our general law, but has said in plain, rough, expressive terms—*proveably*—that is, says Lord Coke, *not upon conjectural presumptions or inferences, or strains of wit*, but upon DIRECT AND PLAIN PROOF—"For the King, Lords, and Com-"mons," continues that great lawyer, "did not "use the word *probably*, for then a common argu-"ment might have served; but *proveably*, which "signifies the highest force of demonstration."—And what evidence, Gentlemen of the Jury, does the Crown offer to you in compliance with these sound and sacred doctrines of justice?—a few broken, interrupted, disjointed words, without context or connexion,—uttered by the speaker in agitation and heat,—heard by those who relate them to you, in the midst of tumult and confusion,—and even those words, mutilated as they are, in direct opposition to, and inconsistent with repeated and earnest declarations, delivered at the very same time, and on the very same occasion, related to you by a much greater number of persons, and absolutely incompatible with the whole tenour of his conduct. Which of us all, Gentlemen, would be safe, standing at the bar of God, or man, if we were not to be judged by the regular current of our lives and conversations,

but by detached and unguarded expressions, picked out by malice, and recorded, without context or circumstances, against us? Yet such is the only evidence, on which the Crown asks you to dip your hands, and to stain your consciences, in the innocent blood of the noble and unfortunate youth who now stands before you:—on the single evidence of the words you have heard from their witnesses, *(for of what but words have you heard?)* which, even if they had stood uncontroverted by the proofs that have swallowed them up, or unexplained by circumstances which destroy their malignity, could not, *at the very worst*, amount in law to more than a breach of the act against tumultuous petitioning (if such an act still exists); since the worst malice of his enemies has not been able to bring up one single witness to say, that he ever *directed*, *countenanced*, or *approved* rebellious force against the legislature of his country. It is therefore a matter of astonishment to me, that men can keep the natural colour in their cheeks, when they ask for human life, even on the Crown's original case, *though the Prisoner had made no defence*.—But will they still continue to ask for it after what they have heard? I will just remind the Solicitor General, before he begins his reply, what matter he has to encounter. He has to encounter this:—That the going up in a body was not even originated by Lord George, but by others in his absence.—That when proposed by him officially as Chairman, it was adopted by the

whole Association, and consequently was *their* act as much as his.—That it was adopted not in a conclave, but with open doors, and the resolution published to all the world.—That it was known of course to the ministers and magistrates of the country, who did not even signify to him, or to any body else, its illegality or danger.—That decency and peace were enjoined and commanded.—That the regularity of the procession, and those badges of distinction, which are now cruelly turned into the charge of an hostile array against him, were expressly and *publicly* directed *for the preservation of peace, and the prevention of tumult.*—That while the House was deliberating, he repeatedly entreated them to behave with decency and peace, and to retire to their houses; *though he knew not that he was speaking to the enemies of his cause.*—That when they at last dispersed, no man thought or imagined that treason had been committed.—That he retired to bed, where he lay unconscious that ruffians were ruining him, by their disorders in the night.—That on Monday he published an advertisement, reviling the authors of the riots: and, as the Protestant cause had been wickedly made the pretext for them, solemnly enjoined all who wished well to it to be obedient to the laws. *(Nor has the Crown even attempted to prove, that he had either given, or that he afterwards gave secret instructions in opposition to that public admonition.)*—That he afterwards begged an audience to receive the King's commands;—that he waited

on the Ministers;—that he attended his duty in Parliament;—and when the multitude,—*amongst whom there was not a man of the associated Protestants*,—again assembled on the Tuesday, under pretence of the Protestant cause, he offered his services, and read a resolution of the House to them, accompanied with every expostulation, which a zeal for peace could possibly inspire.—That he afterwards, in pursuance of the King's direction, attended the magistrates in their duty; honestly and honourably exerting all his powers to quell the fury of the multitude:—a conduct which, to the dishonour of the Crown, has been scandalously turned against him, by criminating him with protections granted publicly in the coach of the Sheriff of London, whom he was assisting in his office of magistracy; although protections of a similar nature were, to the knowledge of the whole Privy Council, granted by Mr. Fisher himself, who now stands in my presence unaccused and unreproved, but who, if the Crown that summoned him *durst have called him*, would have dispersed to their confusion the slightest imputation of guilt.

What then has produced this trial for high treason; or given it, when produced, the seriousness and solemnity it wears?—What, but the inversion of all justice, by judging from *consequences*, instead of from *causes* and *designs?*—what but the artful manner, in which the Crown has endeavoured to blend the petitioning in a body, and the zeal with

which an animated disposition conducted it, with the melancholy crimes that followed?—crimes, which the shameful indolence of our magistrates,—which the total extinction of all police and government, suffered to be committed in broad day, and in the delirium of drunkenness, by an unarmed banditti, without a head,—without plan or object,—and without a refuge from the instant gripe of justice:—a banditti, with whom the associated Protestants, and their President, had no manner of connexion, and whose cause they overturned, dishonoured, and ruined.

How unchristian then is it to attempt, without evidence, to infect the imaginations of men who are sworn dispassionately and disinterestedly to try the trivial offence, of assembling a multitude with a petition to repeal a law (which has happened so often in all our memories), by blending it with the fatal catastrophe, on which every man's mind may be supposed to retain some degree of irritation?—*O fie! O fie!* Is the intellectual seat of justice to be thus impiously shaken?—Are your benevolent propensities to be thus disappointed and abused?—Do they wish you, while you are listening to the evidence, to connect it with unforeseen consequences, in spite of reason and truth?—Is it their object to hang the millstone of prejudice around his innocent neck to sink him?—If there be such men, may Heaven forgive them for the attempt, and inspire you with for-

titude and wisdom, to discharge your duty with calm, steady, and reflecting minds.

Gentlemen, I have no manner of doubt that you will.—I am sure you cannot but see, notwithstanding my great inability, increased by a perturbation of mind (arising, thank God! from no dishonest cause), that there has been not only no evidence on the part of the Crown, to fix the guilt of the late commotions upon the Prisoner, but that, on the contrary, we have been able to resist the *probability*, I might almost say the *possibility*—of the charge, not only by living witnesses, whom we only ceased to call, because the trial would never have ended, but by the evidence of all the blood that has paid the forfeit of that guilt already; an evidence that I will take upon me to say is the strongest, and most unanswerable, which the combination of natural events ever brought together since the beginning of the world for the deliverance of the oppressed. Since in the late numerous trials for acts of violence and depredation, though conducted by the ablest servants of the Crown, with a laudable eye to the investigation of the subject which now engages us, no one fact appeared, which showed any plan,—any object,—any leader.—Since out of forty-four thousand persons, who signed the petition of the Protestants, *not one* was to be found among those who were convicted, tried, or even apprehended on suspicion;—and since out of all the felons, who were let loose from prisons, and who assisted in the de-

struction of our property, not a single wretch was to be found, who could even attempt to save his own life by the plausible promise of giving evidence to-day.

What can overturn such a proof as this?—Surely a good man might, without superstition, believe, that such an union of events was something more than natural, and that the Divine Providence was watchful for the protection of innocence and truth.

I may now therefore relieve you from the pain of hearing me any longer, and be myself relieved from speaking on a subject which agitates and distresses me. Since Lord George Gordon stands clear of every hostile act or purpose against the Legislature of his country, or the properties of his fellow-subjects—since the whole tenour of his conduct repels the belief of the *traitorous intention* charged by the indictment—my task is finished. I shall make no address to your passions—I will not remind you of the long and rigorous imprisonment he has suffered; —I will not speak to you of his great youth, of his illustrious birth, and of his uniformly animated and generous zeal in Parliament for the constitution of his country. Such topics might be useful in the balance of a doubtful case; yet even then I should have trusted to the honest hearts of Englishmen to have felt them without excitation. At present, the plain and rigid rules of justice and truth are sufficient to entitle me to your verdict.

SPEECH *of the Honourable* THOMAS ERSKINE, *at Shrewsbury, August the sixth, A. D.* 1784, *for the Rev.* WILLIAM DAVIES SHIPLEY, *Dean of St. Asaph, on his Trial for publishing a seditious Libel.*

THE SUBJECT.

IN the year 1783, *soon after the conclusion of the calamitous war in America, the public attention was very warmly and generally turned throughout this country towards the necessity of a reform in the representation of the people in the House of Commons. Several societi were formed in different parts of England and Wales for the promotion of it; and the Duke of Richmond, and Mr. Pitt, the then Minister, took the lead in bringing the subject before Parliament.*

To render this great national object intelligible to the ordinary ranks of the people, Sir William Jones, then an eminent barrister in London, and afterwards one of the Judges of the Supreme Court of Judicature at Bengal, composed a Dialogue between a Scholar and a Farmer, as a vehicle for explaining to common

capacities the great principles of society and government, and for showing the defects in the representation of the people in the British Parliament. Sir William Jones having married a sister of the Dean of St. Asaph, he became acquainted with, and interested in this Dialogue, and recommended it strongly to a committee of gentlemen of Flintshire, who were at that time associated for the object of reform, where it was read, and made the subject of a vote of approbation. The Court party on the other hand having made a violent attack upon this committee for the countenance thus given to the Dialogue, the Dean of St. Asaph, considering (as he himself expressed it) *that the best means of justifying the composition, and those who were attacked for their approbation of it, was to render it public, that the world might decide the controversy, sent it to be printed, prefixing to it the following advertisement:*

"A short defence hath been thought necessary "against a violent and groundless attack upon the "Flintshire Committee, for having testified their "approbation of the following Dialogue, which hath "been publicly branded with the most injurious epi-"thets; and it is conceived that the sure way to "vindicate this little tract from so unjust a character, "will be as publicly to produce it. The friends of "the Revolution will instantly see, that it contains "no principle which has not the support of the "highest authority, as well as the clearest reason.

"If the doctrines which it slightly touches in a

" manner suited to the nature of the Dialogue, be " ' seditious, treasonable, and diabolical,' Lord " Somers was an incendiary, Locke a traitor, and " the Convention Parliament a pandæmonium; but " if those names are the glory and boast of England, " and if that Convention secured our liberty and hap- " piness, then the doctrines in question, are not only " just and rational, but constitutional and salutary: " and the reproachful epithets belong wholly to the " system of those who so grossly misapplied it."

The Dialogue being published, the late Mr. Fitz-maurice, brother to the late Marquis of Lans-downe, preferred a bill of indictment against the Dean for a libel, at the great sessions for Denbigh-shire, where the cause stood to be tried at Wrexham as-sizes in the summer of 1783, *but was put off by an application to the Court, founded upon the circulation of papers to prejudice the trial. At the spring assizes for Wrexham in* 1784, *the cause again stood for trial, and the Defendant attended by his Counsel a second time, when it was removed by the Prosecutor into the Court of King's Bench, and came on at last to be tried at Shrewsbury, as being in the next adjacent* English *county.*

The indictment set forth, " That William Davies " Shipley, late of Llannerch Park, in the parish of " Henllan in the county of Denbigh, clerk, being a " person of a wicked and turbulent disposition, and " maliciously designing and intending to excite and " diffuse, amongst the subjects of this realm, discon- " tents, jealousies, and suspicions of our Lord the

" *King, and his government, and disaffection and* " *disloyalty to the person and government of our Lord* " *the now King; and to raise very dangerous sedi-* " *tions and tumults within this kingdom; and to draw* " *the government of this kingdom into great scandal,* " *infamy, and disgrace; and to incite the subjects of* " *our Lord the King to attempt, by force and vio-* " *lence, and with arms, to make alterations in the* " *government, state, and constitution of this kingdom,* " *on the first day of April, in the twenty-third year* " *of the reign of our Sovereign Lord George the* " *Third, now King of Great Britain, and so forth,* " *at Wrexham, in the county of Denbigh aforesaid,* " *wickedly and seditiously published, and caused and* " *procured to be published a certain false, wicked,* " *malicious, seditious, and scandalous libel of and* " *concerning our said Lord the King, and the go-* " *vernment of this realm, in the form of a Dialogue* " *between a supposed gentleman and a supposed far-* " *mer, wherein the part of the supposed gentleman,* " *in the supposed Dialogue, is denoted by the letter* " *G, and the part of the supposed farmer, in such* " *supposed Dialogue, is denoted by the letter F, en-* " *titled,* ' The Principles of Government, in a Dia- " ' logue between a Gentleman and a Farmer.' *In* " *which said libel are contained the false, wicked,* " *malicious, seditious, and scandalous matters fol-* " *lowing,*" *(to wit.)*

The indictment then set forth verbatim the following Dialogue, without any averments or innuendos, ex-

cept those above mentioned, viz. that by "G." *throughout the Dialogue was meant Gentleman, and by* "F." *Farmer—By* "The King" (when it occurred), THE KING OF GREAT BRITAIN; *and by* "PARLIAMENT" (when it occurred), THE PARLIAMENT OF THIS KINGDOM. *The Dialogue therefore as it follows is in fact the whole indictment, only without the constant repetition that F. means Farmer, K. King, and P. Parliament.*

The Principles of Government, in a Dialogue between a Gentleman and a Farmer.

F. Why should humble men, like me, sign or set marks to petitions of this nature? It is better for us farmers to mind our husbandry, and leave what we cannot comprehend to the King and Parliament.

G. You can comprehend more than you imagine; and, as a free member of a free state, have higher things to mind than you may conceive.

F. If by free you mean out of prison, I hope to continue so, as long as I can pay my rent to the squire's bailiff; but, what is meant by a free state?

G. Tell me first what is meant by a club in the village, of which I know you to be a member?

F. It is an assembly of men, who meet after work every Saturday to be merry and happy for a few hours in the week.

G. Have you no other object but mirth?

F. Yes; we have a box, into which we contribute

equally from our monthly or weekly savings, and out of which any members of the club are to be relieved in sickness or poverty; for the parish officers are so cruel and insolent, that it were better to starve than apply to them for relief.

G. Did they, or the squire, or the parson, or all together, compel you to form this society?

F. Oh! no; we could not be compelled; we formed it by our choice.

G. You did right—But have you not some head or president of your club?

F. The master for each night is chosen by all the company present the week before.

G. Does he make laws to bind you in case of ill-temper or misbehaviour?

F. He make laws! He bind us! No; we have all agreed to a set of equal rules, which are signed by every new comer, and were written in a strange hand by young Spelman, the lawyer's clerk, whose uncle is a member.

G. What should you do, if any member were to insist on becoming perpetual master, and on altering your rules at his arbitrary will and pleasure?

F. We should expel him.

G. What, if he were to bring a serjeant's guard, when the militia are quartered in your neighbourhood, and insist upon your obeying him?

F. We would resist if we could; if not, the society would be broken up.

G. Suppose that, with his serjeant's guard, he were

to take the money out of the box, or out of your pockets?

F. Would not that be a robbery?

G. I am seeking information from you. How should you act upon such an occasion?

F. We should submit perhaps, at that time; but should afterwards try to apprehend the robbers.

G. What if you could not apprehend them?

F. We might kill them, I should think; and if the King would not pardon us, God would.

G. How could you either apprehend them, or, if they resisted, kill them, without a sufficient force in your own hands?

F. Oh! we are all good players at single-stick, and each of us has a stout cudgel or quarter-staff in the corner of his room.

G. Suppose that a few of the club were to domineer over the rest, and insist upon making laws for them?

F. We must take the same course; except it would be easier to restrain one man than a number; but we should be the majority with justice on our side.

G. A word or two on another head. Some of you, I presume, are no great accountants?

F. Few of us understand accounts; but we trust old Lilly, the schoolmaster, whom we believe to be an honest man; and he keeps the key of our box.

G. If your money should, in time, amount to a large sum, it might not, perhaps, be safe to keep it at his house, or in any private house.

F. Where else should we keep it?

G. You might choose to put it into the funds, or to

lend it the squire, who has lost so much lately at Newmarket, taking his bond on some of his fields, as your security for payment, with interest.

F. We must, in that case, confide in young Spelman, who will soon set up for himself, and, if a lawyer can be honest, will be an honest lawyer.

G. What power do you give to Lilly, or should you gave to Spelman, in the case supposed?

F. No power; we should give them both a due allowance for their trouble, and should expect a faithful account of all they had done for us.

G. Honest men may change their nature. What if both or either of them were to deceive you?

F. We should remove them, put our trust in better men, and try to repair our loss.

G. Did it never occur to you, that every state or nation was only a great club?

F. Nothing ever occurred to me on the subject; for I never thought about it.

G. Though you never thought before on the subject, yet you may be able to tell me why you suppose men to have assembled, and to have formed nations, communities, or states, which all mean the same thing?

F. In order, I should imagine, to be as happy as they can while they live.

G. By happy, do you mean merry only?

F. To be as merry as they can without hurting themselves or their neighbours, but chiefly to secure themselves from danger, and to relieve their wants.

G. Do you believe that any King or Emperor compelled them to associate?

F. How could one man compel a multitude? a King or an Emperor, I presume, is not born with a hundred hands.

G. When a prince of the blood shall, in any country, be so distinguished by nature, I shall then, and then only, conceive him to be a greater man than you: but might not an army, with a King or General at their head, have compelled them to assemble?

F. Yes; but the army must have been formed by their own choice; one man of a few can never govern many without their consent.

G. Suppose, however, that a multitude of men, assembled in a town or city, were to choose a King or Governor; might they not give him high power and authority?

F. To be sure; but they would never be so mad, I hope, as to give him a power of making their laws.

G. Who else should make them?

F. The whole nation or people.

G. What if they disagreed?

F. The opinion of the greater number, as in our village clubs, must be taken, and prevail.

G. What could be done, if the society were so large that all could not meet at the same place?

F. A greater number must choose a less.

G. Who should be the choosers?

F. All who are not upon the parish in our club. If a

man asks relief of the overseer, he ceases to be one of us, because he must depend upon the overseer.

G. Could not a few men, one in seven, for instance, choose the assembly of law-makers as well as a larger number?

F. As conveniently, perhaps; but I would not suffer any man to choose another who was to make laws, by which my money or my life might be taken from me.

G. Have you a freehold in any county of forty shillings a year?

F. I have nothing in the world but my cattle, implements of husbandry, and household goods, together with my farm, for which I pay a fixed rent to the squire.

G. Have you a vote in any city or borough?

F. I have no vote at all; but am able, by my honest labour, to support my wife and four children; and, whilst I act honestly, I may defy the laws.

G. Can you be ignorant, that the Parliament to which members are sent by this county, and by the next market-town, have power to make new laws, by which you and your family may be stripped of your goods, thrown into prison, and even deprived of life?

F. A dreadful power! Having business of my own, I never made inquiries concerning the business of Parliament; but imagined the laws had been fixed for many hundred years.

G. The common laws to which you refer, are equal, just, and humane; but the King and Parliament may alter them when they please.

F. The King ought therefore to be a good man, and the Parliament to consist of men equally good.

G. The King alone can do no harm; but who must judge the goodness of Parliament men?

F. All those whose property, freedom, and lives, may be affected by their laws.

G. Yet six men in seven who inhabit this kingdom, have, like you, no votes; and the petition which I desired you to sign, has nothing for its object but the restoration of you all, to the right of choosing those lawmakers, by whom your money or your lives may be taken from you: attend while I read it distinctly.

F. Give me your pen. I never wrote my name, ill as it may be written, with greater eagerness.

G. I applaud you, and trust that your example will be followed by millions. Another word before we part. Recollect your opinion about your club in the village, and tell me what ought to be the consequence, if the King alone were to insist on making laws, or on altering them at his will and pleasure.

F. He too must be expelled.

G. Oh! but think of his standing army, and of the militia, which now are his in substance, though ours in form.

F. If he were to employ that force against the nation, they would, and ought to resist him, or the state would cease to be a state.

G. What if the great accountants, and great lawyers, the Lillys and Spelmans of the nation, were to

abuse their trust, and cruelly injure, instead of faithfully serving the public?

F. We must request the King to remove them, and make trial of others; but none should implicitly be trusted.

G. But what if a few great Lords or wealthy men were to keep the King himself in subjection, yet exert his force, lavish his treasure, and misuse his name, so as to domineer over the people, and manage the Parliament?

F. We must fight for the King and ourselves.

G. You talk of fighting, as if you were speaking of some rustic engagement at a wake; but your quarter-staffs would avail you little against bayonets.

F. We might easily provide ourselves with better arms.

G. Not so easily. When the moment of resistance came, you would be deprived of all arms; and those who should furnish you with them, or exhort you to take them up, would be called traitors, and probably put to death.

F. We ought always therefore to be ready, and keep each of us a strong firelock in the corner of his bedroom.

G. That would be legal as well as rational. Are you, my honest friend, provided with a musket?

F. I will contribute no more to the club, and purchase a fireloch with my savings.

G. It is not necessary. I have two, and will make you a present of one, with complete accoutrements.

F. I accept it thankfully, and will converse with you at your leisure on other subjects of this kind.

G. In the mean while, spend an hour every morning in the next fortnight, in learning to prime and load expeditiously, and to fire and charge with bayonet firmly and regularly. I say every morning, because, if you exercise too late in the evening, you may fall into some of the legal snares, which have been spread for you by those gentlemen, who would rather secure game for their table, than liberty for their nation.

F. Some of my neighbours, who have served in the militia, will readily teach me; and perhaps the whole village may be persuaded to procure arms, and learn their exercise.

G. It cannot be expected that the villagers should purchase arms; but they might easily be supplied, if the gentry of the nation would spare a little from their vices and luxury.

F. May they turn to some sense of honour and virtue!

G. Farewell, at present, and remember, That a free state is only a more numerous and more powerful club; and that he only is a free man, who is member of such a state.

F. Good morning, Sir: you have made me wiser and better than I was yesterday; and yet methinks, I had some knowledge in my own mind of this great subject, and have been a politician all my life without perceiving it.

This Dialogue (as above set forth verbatim from the indictment), with the intentions, as alleged in the introductory part, constituted the charge, and the publication of it by the Dean's direction constituted the proof.

On the Dean's part, the abovementioned advertisement prefixed to it, was given in evidence to show with what intention he published it; and his conduct in general relating to it was proved. Witnesses were also called to his general character as a good subject.

Mr. Bearcroft, as Counsel for the Crown, having addressed the Jury in a very able and judicious speech, and the evidence being closed for the Crown, Mr. Erskine spoke as follows for the Dean of St. Asaph.

SPEECH

FOR THE

DEAN OF ST. ASAPH.

GENTLEMEN OF THE JURY,

MY learned and respectable friend having informed the Court that he means to call no other witnesses to support the prosecution, you are now in possession of the whole of the evidence, on which the Prosecutor has ventured to charge my reverend Client, the Dean of Saint Asaph, with a seditious purpose to excite disloyalty and disaffection to the person of his King, and an armed rebellion against the state and constitution of his country; which evidence is nothing more than his direction to another to publish this Dialogue, containing in itself nothing seditious, with an advertisement prefixed to it, containing a solemn protest against all sedition.

The only difficulty therefore, which I feel in resisting so false and malevolent an accusation, is to be able to repress the feeling excited by its folly and injustice, within those bounds which may

leave my faculties their natural and unclouded operations; for I solemnly declare to you, that if he had been indicted as a libeller of our holy religion, only for publishing that the world was made by its Almighty Author, my astonishment could not have been greater than it is at this moment, to see the little book, which I hold in my hand, presented by a Grand Jury of English subjects, as a libel upon the government of England. Every sentiment contained in it (if the interpretations of words are to be settled, not according to fancy, but by the common rules of language) is to be found in the brightest pages of English literature, and in the most sacred volumes of English laws: if any one sentence from the beginning to the end of it be seditious or libellous, the Bill of Rights (to use the language of the advertisement prefixed to it) was a seditious libel;—the Revolution was a wicked rebellion;—the existing government is a traitorous conspiracy against the hereditary monarchy of England;—and our gracious Sovereign, whose title, I am persuaded, we are all of us prepared to defend with our blood, is an usurper of the crowns of these kingdoms.

That all these absurd, preposterous, and treasonable conclusions, follow necessarily and unavoidably from a conclusion *upon this evidence*,—that this Dialogue is a libel,—following the example of my learned friend, who has pledged *his* personal veracity in support of his sentiments, I assert, upon *my* honour, to be my unaltered, and I believe I

may say, unalterable opinion, formed upon the most mature deliberation; and I choose to place that opinion in the very front of my address to you, that you may not, in the course of it, mistake the energies of truth and freedom for the zeal of professional duty.

This declaration of my own sentiments, even if my friend had not set me the example by giving you his, I should have considered to be my duty in this cause; for although, in ordinary cases, where the private right of the party accused is alone in discussion, and no general consequences can follow from the decision, the advocate and the private man ought in sound discretion to be kept asunder; yet there are occasions, when such separation would be treachery and meanness. In a case where the dearest rights of society are involved in the resistance of a prosecution,—where the party accused is (as in this instance) but a mere name,—where the whole community is wounded through his sides,—and where the conviction of the private individual is the subversion or surrender of public privileges, the advocate has a more extensive charge:—the duty of the patriot citizen then mixes itself with his obligation to his client, and he disgraces himself, dishonours his profession, and betrays his country, if he does not step forth in his personal character, and vindicate the rights of all his fellow-citizens, which are attacked through the medium of the man he is defending. Gentlemen, I do not mean to shrink from

that responsibility upon this occasion; I desire to be considered the fellow-criminal of the Defendant, if by your verdict he should be found one, by publishing in advised speaking (which is substantially equal in guilt to the publication that he is accused of before you), my hearty approbation of every sentiment contained in this little book; promising here, in the face of the world, to publish them upon every suitable occasion, amongst that part of the community within the reach of my precept, influence, and example. If there be any more prosecutors of this denomination abroad among us, they know how to take advantage of these declarations *.

Gentlemen, when I reflect upon the danger which has often attended the liberty of the press in former times, from the arbitrary proceedings of abject, unprincipled, and dependant Judges, raised to their situations without abilities or worth, in proportion to their servility to power, I cannot help congratulating the public that you are to try this indictment with the assistance of the learned Judge before you;—much too instructed in the laws of this land to mislead you by mistake, and too conscientious to misinstruct you by design.

The days indeed I hope are now past, when Judges and Jurymen upon state trials, were constantly pulling in different directions; the Court en-

* It will be seen hereafter, that when the Dialogue was brought before the Court, by Mr. Erskine's motion to arrest the judgment, the Court was obliged to declare that it contained no illegal matter.

deavouring to annihilate altogether the province of the Jury, and the Jury in return listening with disgust, jealousy, and alienation, to the directions of the Court. Now they may be expected to be tried with that harmony which is the beauty of our legal constitution;—the Jury preserving their independence in judging of the intention, which is the essence of every crime; but listening to the opinion of the Judge upon the evidence, and upon the law, with that respect and attention, which dignity, learning, and honest intention in a magistrate must and ought always to carry along with them.

Having received my earliest information in my profession from the learned Judge himself *, and having daily occasion to observe his able administration of justice, you may believe that I anticipate nothing from the Bench unfavourable to innocence; and I have experienced his regard in too many instances, not to be sure of every indulgence that is personal to myself.

These considerations enable me with more freedom to make my address to you upon the merits of this prosecution, in the issue of which your own general rights, as members of a free state, are not less involved, than the private rights of the individual I am defending.

Gentlemen, my reverend friend stands before you

* Mr. Erskine was for some time one of the Judge's pupils as a special pleader, before he was raised to the bench.

under circumstances new and extraordinary, and I might add harsh and cruel; he is not to be tried in the forum *where he lives*, according to the wise and just provisions of our ancient laws;—he is not to be tried by the vicinage, who, from their knowledge of general character and conduct, were held by our wise and humane ancestors to be the fittest, or rather the only judges in criminal cases:—he has been deprived of that privilege by the arts of the Prosecutor, and is called before *you*, who live in *another* part of the country, and who, except by vague reputation, are utter strangers to him.

But the prosecution itself, abandoned by the public, and left, as you cannot but know it is, in the hands of an individual, is a circumstance not less extraordinary and unjust,—unless as it palpably refutes the truth of the accusation.—For, if this little book be a libel at all, it is a libel upon *the state and constitution of the nation*, and *not* upon any person under the protection of its laws: it attacks the character of no man in this or any other country; and therefore no man is *individually or personally* injured or offended by it. If it contain matter dangerous or offensive, *the state alone* can be endangered or offended.

And are we then reduced to that miserable condition in this country, that, if discontent and sedition be publicly exciting amongst the people, the charge of suppressing it devolves upon Mr. Jones? My learned friend, if he would have you believe that

this Dialogue is seditious and dangerous, must be driven to acknowledge, that Government has grossly neglected its trust; for if, as he says, it has an evident tendency in critical times to stir up alarming commotions, and to procure a reform in the representation of the people, by violence and force of arms;—and if, as he likewise says, a public prosecution is a proceeding calculated to prevent these probable consequences; what excuse is he prepared to make for the Government, which, when, according to the evidence of his own witness, an application was made to it for that express purpose, positively, and on deliberation refused to prosecute?—What will he say for one learned gentleman *, who dead is lamented, and for another †, who living is honoured by the whole profession; both of whom, on the appearance of this Dialogue, were charged with the duty of prosecuting all offenders against the state, yet who not only read it day after day in pamphlets and newspapers, without stirring against the publishers, but who, on receiving it from the Lords of the Treasury by official reference, opposed a prosecution at the national expense?—What will he say of the successors of those gentlemen, who hold their offices at this hour, and who have ratified the opinions of their predecessors by their own conduct?—And what, lastly, will he say in vindication of Majesty

* Mr. Wallace, then Attorney General.

† Mr. Lee, late Attorney, then Solicitor General.

itself, to my knowledge not unacquainted with the subject, yet from whence no orders issued to the inferior servants of the state?

So that, after Mr. Fitzmaurice, representing this Dialogue as big with ruin to the public, has been laughed at by the King's Ministers at the Treasury;—by the King himself, of whom he had an audience;—and by those appointed by his wisdom to conduct all prosecutions; you are called upon to believe that it is a libel dangerous and destructive;—and that while the state, neglected by those who are charged with its preservation, is tottering to its centre, the falling constitution of this ancient nation is happily supported by Mr. Jones, who, like another Atlas, bears it upon his shoulders *.

Mr. Jones then, who sits before you, is the only man in England who accuses the Defendant. He alone takes upon himself the important office of dictating to His Majesty,—of reprobating the proceedings of his Ministers,—and of superseding his Attorney and Solicitor General;—and shall I insult your understandings by supposing that this accusation proceeds from pure patriotism and public spirit in him, *or more properly in that other gentleman, whose deputy upon this occasion he is well known to be?*

* Mr. Jones, the present Marshal of the King's Bench, became entangled in the prosecution as the attorney of Mr. Fitzmaurice, brother to the late Marquis of Lansdowne—he is esteemed a very worthy man, and has since lived in habits of intimacy and regard with Lord Erskine.

Whether such a supposition would not indeed be an insult, his conduct as a public prosecutor will best illustrate.

He originally put the indictment in a regular course of trial in the very neighbourhood, where its operations must have been most felt, and where, if criminal in its objects, the criminality must have been the most obvious. A Jury of that vicinage was assembled to try it, and the Dean having required my assistance on the occasion, I travelled two hundred miles with great inconvenience to myself, to do him that justice which he was entitled to as my friend, and to pay to my country that tribute which is due from every man when the LIBERTY OF THE PRESS is invaded.

The Jury thus assembled, was formed from the first characters in their county:—men who would have most willingly condemned either disaffection to the person of the King, or rebellion against his government: yet when such a Jury was empannelled, and such names were found upon it as Sir Watkyn Williams Wynne, and others not less respectable, this *public-spirited Prosecutor, who had no other object than public justice,* was confounded and appalled.—He said to himself, This will never do.—All these gentlemen know, not only that this paper is not in itself a libel, but that it neither was nor could be published by the Dean with a libellous intention; what is worse than all, they are men of too proud an honour to act, upon any persuasion or au-

thority, against the conviction of their own consciences. But how shall I get rid of them?—They are already struck and empannelled, and unfortunately neither integrity nor sense are challenges to jurors.

Gentlemen, in this dilemma, he produced an affidavit, which appeared to me not very sufficient for the purpose of evading the trial; but as those, who upon that occasion had to decide that question upon their oaths, were of a different opinion, I shall not support my own by any arguments, meaning to conduct myself, with the utmost reverence for the administration of justice. I shall therefore content myself with stating, that the affidavit contained no other matter, than that there had been published at Wrexham an extract from Dr. Towers's Biography, containing accounts of trials for libels published above a century ago, from which the Jurors (if it had fallen in their way, which was not even deposed to) might have been informed of their right to judge their fellow-citizens, for crimes affecting their liberties or their lives;—a doctrine not often disputed, and never without the vindication of it, by the greatest and most illustrious names in the law. But, says this *public-spirited* Prosecutor, IF THE JURY are to try this, I must withdraw my prosecution; for they are men of honour and sense;—they know the constitution of their country, and they know the Dean of Saint Asaph; and I

have therefore nothing left but to apply to the Judges, suggesting that the minds of the Special Jury are so prejudiced, by being told that they are Englishmen, and that they have the power of acquitting a defendant accused of a crime, if they think him innocent, that they are unfit to sit in judgment upon him. Gentlemen, the scheme succeeded; and I was put in my chaise, and wheeled back again, with the matter in my pocket which had postponed the trial;—matter which was to be found in every shop in London, and which had been equally within the reach of every man, who had sat upon a jury since the times of King Charles the Second.

In this manner, above a year ago, the Prosecutor deprived my reverend friend of an honourable acquittal in his own country. It is a circumstance material in the consideration of this indictment, because, in administering public justice, you will, I am persuaded, watch with jealousy to discover, whether public justice be the end and object of the prosecution: and in trying, whether my reverend Client proceeded *malo animo* in the publication of this Dialogue, you will certainly obtain some light from examining, *quo animo* the Prosecutor has arraigned him before you.

When the indictment was brought down again to trial at the next following assizes, there were no more pamphlets to form a pretext for procrastination. I was surprised, indeed, that they did not employ some of their own party to publish one,

and have recourse to the same device which had been so successful before; but this mode either did not strike, or was thought to be but fruitlessly delaying that acquittal, which could not be ultimately prevented.

The Prosecutor, therefore, secretly sued out a writ of *certiorari* from the Court of King's Bench, the effect of which was to remove the indictment from the Court of Great Sessions in Wales, and to bring it to trial as an English record in an English county. Armed with this secret weapon to defeat the honest and open arm of justice, he appeared at Wrexham, and gave notice of trial, saying to himself, "I will "take no notice that I have the King's writ, till I "see the complexion of the jury;—if I find them "men fit for my purpose, either as the prostitutes "of power, or as men of little minds, or from their "insignificance equally subject to the frown of au- "thority, and the blandishments of corruption, so "that I may reasonably look for a sacrifice, instead "of a trial, I will then keep the *certiorari* in my "pocket, and the proceedings will of course go for- "ward:—but if, on the contrary, I find such names "as I found before;—if the gentlemen of the county "are to meet me; I will then, with His Majesty's "writ in my hand, discharge them from giving that "verdict of acquittal, which their understandings "would dictate, and their consciences impose."

Such, without any figure, I may assert to have been the secret language of Mr. Jones to himself, un-

less he means to slander those gentlemen in the face of this Court, by saying that the jurors, from whose jurisdiction he, by his *certiorari*, withdrew the indictment, were not impartial, intelligent, and independent men ;—a sentiment which he dares not presume even to whisper, because in public or in private he would be silenced by all who heard it.

From such a tribunal this public-spirited Prosecutor shrunk a second time : and just as I was getting out of my chaise at Wrexham, after another journey from the other side of the island, without even notice of an intention to postpone the trial, he himself in person (his counsel having, from a sense of honour and decency, refused it) presented the King's writ to the Chief Justice of Chester, which dismissed the Dean for ever from the judgment of his neighbours and countrymen, and which brings him before you to-day.

What opinion then must the Prosecutor entertain of your honour, and your virtues, since he evidently expects from you a verdict, which it is manifest from his conduct he did not venture to hope for, from such a jury as I have described to you ?

Gentlemen, I observe an honest indignation rising in all your countenances on the subject, which, with the arts of an advocate, I might easily press into the service of my friend ; but as his defence does not require the support of your resentments, or even of those honest prejudices, to which liberal minds

are but too open without excitation, I shall draw a veil over all that may seduce you from the correctest and the severest judgment.

Gentlemen, the Dean of St. Asaph is indicted by the Prosecutor, not for having published this little book;—that is not the charge:—he is indicted for publishing a false, scandalous, and malicious libel, and for publishing it (I am now going to read the very words of the charge) "with a malicious design and "intention to diffuse among the subjects of this "realm jealousies and suspicions of the King and "his Government;—to create disaffection to his "person;—to raise seditions and tumults within the "kingdom;—and to excite His Majesty's subjects "to attempt, by armed rebellion and violence, to "subvert the state and constitution of the nation."

These are not words of *form*, but of the very essence of the charge. The Defendant pleads that he is not guilty, and puts himself upon you his country; and it is fit, therefore, that you should be distinctly informed of the effect of a general verdict of guilty on such an issue, before you venture to pronounce it.—By such a verdict you do not merely find, that the Defendant *published the paper in question*; for if that were the whole scope of such a finding, involving no examination into the *merits* of the thing published, the term *guilty* might be wholly inapplicable and unjust, because the publication of that which is not criminal cannot be a crime, and because a man cannot be *guilty* of publishing that which

contains in it nothing which constitutes guilt. This observation is confirmed by the language of the record; for if the verdict of guilty involved no other consideration than the simple fact of publication, the legal term would be, *that the Defendant* PUBLISHED, not that he was GUILTY of publishing:—yet they, who tell you that a general verdict of guilty comprehends nothing more than the fact of publishing, are forced in the same moment to confess, that if you found *that fact alone*, without applying to it the epithet of *guilty*, no judgment or punishment could follow from your verdict; and they therefore call upon you to pronounce that guilt, which they forbid you to examine into, acknowledging at the same time, that it can be legally pronounced by NONE BUT YOU:—a position shocking to conscience, and insulting to common sense.

Indeed, every part of the record exposes the absurdity of a verdict of *guilty*, which is not founded on a previous judgment that the matter indicted is a libel, and that the Defendant published it with a criminal intention; for if you pronounce the word *guilty*, without meaning to find sedition in the thing published, or in the mind of the publisher, you expose to shame and punishment the innocence which you mean to protect; since the instant that you say the Defendant is *guilty*, the gentleman who sits under the Judge is bound by law to record him *guilty in manner and form as he is accused*; i. e. guilty of publishing a seditious libel, with a seditious

intention; and the Court above is likewise bound to put the same construction on your finding. Thus, without inquiry into the only circumstance which can constitute *guilt*, and without meaning to find the Defendant *guilty*, you may be seduced into a judgment which your consciences may revolt at, and your speech to the world deny; but which the authors of this system have resolved that you shall not explain to the Court, when it is proceeding to punish the Defendant on the authority of your intended verdict of acquittal.

As a proof that this is the plain and simple state of the question, I might venture to ask the learned Judge, what answer I should receive from the Court of King's Bench, if you were this day to find the Dean of St. Asaph guilty, but without meaning to find it a libel, or that he published it with a wicked and seditious purpose; and I, on the foundation of your wishes and opinions, should address myself thus to the Court when he was called up for judgment:

"My Lords, I hope that, in mitigation of my "Client's punishment, you will consider that he "published it with perfect innocence of intention, "believing, on the highest authorities, that every "thing contained in it was agreeable to the laws and "constitution of his country; and that your Lord-"ships will further recollect that the Jury, at the "trial, gave no contrary opinion, finding only *the* "*fact of publication*."

Gentlemen, if the patience and forbearance of the Judges permitted me to get to the conclusion of such an absurd speech, I should hear this sort of language from the Court in answer to it: "We are "surprised, Mr. Erskine, at every thing we have "heard from you. You ought to know your pro- "fession better, after seven years practice of it, "than to hold such a language to the Court: *you* "*are estopped by the verdict of guilty, from saying* "*he did not publish with a seditious intention*; and "we cannot listen to the declarations of jurors in "contradiction to their recorded judgment."

Such would be the reception of that defence;—and thus you are asked to deliver over the Dean of St. Asaph into the hands of the Judges, humane and liberal indeed, but who could not betray *their* oaths, because you had set them the example by betraying *yours*, and who would therefore be bound to believe him criminal, because *you* had said so on the record, though in violation of your opinions — opinions which, as ministers of the law, they could not act upon,—to the existence of which they could not even advert.

The conduct of my friend Mr. Bearcroft, upon this occasion, which was marked with wisdom and discretion, is a farther confirmation of the truth of all these observations:—for, if your duty had been confined to the simple question of publication, his address to you would have been nothing more, than that he would call his witness to prove *the fact that*

the Dean published this paper, instead of enlarging to you, as he has done with great ability, on the libellous nature of the publication. There is, therefore, a gross inconsistency in his address to you,—not from want of his usual precision, but because he is hampered by his good sense in stating an absurd argument, which happens to be necessary for his purpose; for he sets out with saying, that if you shall be of opinion it has no tendency to excite sedition, you must find him *not guilty*; and ends with telling you, that whether it *has* or *has not* such tendency, is a question of *law for the Court*, and foreign to the present consideration.—It requires, therefore, no other faculty than that of keeping awake, to see through the fallacy of such doctrines; and I shall therefore proceed to lay before you the observations I have made upon this Dialogue, which you are desired to censure as a libel.

I have already observed, and it is indeed on all hands admitted, that if it be libellous at all, it is a libel on the public government, and not the slander of any private man.

Now to constitute a libel upon the government, one of two things appears to me to be absolutely necessary. The publication must either arraign and misrepresent the general principles, on which the constitution is founded, with a design to render the people turbulent and discontented under it:—or, admitting the good principles of the government in the abstract, must accuse the existing administration

with a departure from them,—in such a manner too, as to convince a Jury of an evil design in the writer.

Let us try this little pamphlet by these touchstones, and let the Defendant stand or fall by the test.

The beginning of this pamphlet, and indeed the evident and universal scope of it, is to render our happy constitution, and the principles on which it is founded well understood, by all that part of the community which are out of the pale of that knowledge by liberal studies and scientific reflections ;—a purpose truly public-spirited, and which could not be better effected, than by having recourse to familiar comparisons drawn from common life, more suited to the frame of unlettered minds than abstract observations.

It was this consideration that led Sir William Jones *, a gentleman of great learning and excellent principles, to compose this Dialogue, and who immediately after avowing himself to be the author, was appointed by the King to be one of the Supreme Judges of our Asiatic empire: where, he would hardly have been selected to preside, if his work had been thought seditious. Of this I am sure, that his intentions were directly the contrary. He thought and felt, as all men of sense must feel and think, that there was no mode so likely to inculcate obedience to government in an Englishman, as to make

* Sir William Jones is now dead, but his name will live for ever in the grateful memory of his country.

him acquainted with its principles; since the English constitution must always be cherished, and revered exactly in the proportion that it is understood.

He therefore divested his mind of all those classical refinements which so remarkably characterize it, and composed this simple and natural Dialogue between a Gentleman and a Farmer: in which the Gentleman, meaning to illustrate the great principles of public government, by comparing them with the lesser combinations of society, asks the Farmer, what is the object of the little club in the village of which he is a member; and if he is a member of it on compulsion, or by his free consent?—If the president is self-appointed, or rules by election?—If he would submit to his taking the money from the box without the vote of the members?—with many other questions of a similar tendency; and being answered in the negative, he very luminously brings forward the analogy by making the Gentleman say to him, "did it never occur to you that every state "is but a great club?" or, in other words, that the greater as well as the lesser societies of mankind are held together by social compacts, and that the government of which you are a subject, is not the rod of oppression in the hands of the strongest, but is of your own creation;—a voluntary emanation from yourself, and directed to your own advantage.

Mr. Bearcroft, sensible that this is the just and natural construction of that part of the Dialogue, was very desirous to make you believe that the other part

of it, touching the reform in the representation of the people in Parliament, had no reference to that context; but that it was to be connected with all that follows about bearing arms. I must therefore beg your attention to that part of the publication, which will speak plainly for itself.

The Gentleman says to the Farmer, on his telling him he had no vote, "Do you know that six men "in seven have, like you, no voice in the election "of those who make the laws which bind your "property and life?" And then asks him to sign a petition which has for its object to render elections co-extensive with the trusts which they repose.—And is there a man upon the Jury, who does not feel that all the other advantages of our constitution are lost to us, until this salutary object is attained; or who is not ready to applaud every man who seeks to attain it by means that are constitutional?

But, according to my friend, the means proposed were not constitutional, but rebellious. I will give you his own words, as I took them down: "The "gentleman was saying, very intelligibly,—Sir, I desire "you to rebel,—to clothe yourself in armour, for "you are cheated of your inheritance. How are "you to rectify this?—How are you to right your-"selves?—Learn the Prussian exercise."

But, how does my friend collect these expressions from the words of the passages, which are shortly these: "And the petition which I desired you to "sign has only for its object the restoration of your

"right to choose your law-makers." I confess I am at a loss to conceive how the Prussian exercise finds its way into this sentence. It is a most martial way of describing pen and ink.—Cannot a man sign a petition without tossing a firelock? I, who have been a soldier, can do either;—but I do not sign my name with a gun. There is, besides, another difficulty in my friend's construction of the sentence. The object of the petition is the choosing of law-makers; but according to him, there is to be an end of all law-makers, and of all laws: for neither can exist under the Prussian exercise. He must be a whimsical scholar, who tells a Farmer to sign a petition for the improvement of government, his real purpose being to set it upon the die of a rebellion, whether there should be any government at all.

But, let me ask you, Gentlemen, whether such strained constructions are to be tolerated in a criminal prosecution, when the simple and natural construction of language falls in directly with the fact? You cannot but know, that, at the time when this Dialogue was written, the table of the House of Commons groaned with petitions presented to the House from the most illustrious names and characters, representing the most important communities in the nation;—not with the threat of the Prussian exercise, but with the prayer of humility and respect to the Legislature, that some immediate step should be taken to avert that ruin, which the defect in the represent-

ation of the people must sooner or later bring upon this falling empire. I do not choose to enter into political discussions here. But we all know, that the calamities which have fallen upon this country have proceeded from that fatal source; and every wise man must be therefore sensible, that a reform, if it can be attained without confusion, is a most desirable object.—But whether it be or be not desirable, is an idle speculation;—because, at all events, the subject has a right to petition for what he *thinks* beneficial; however visionary, therefore, you may think his petition, you cannot deny it to be constitutional and legal; and I may venture to assert, that this Dialogue is the *first abstract speculative writing, which has been attached as a libel since the Revolution*; and from Mr. Bearcroft's admission, that the proceeding is not prudent, I may venture to foretel that it will be the last.

If you pursue this part of the Dialogue to the conclusion, the false and unjust construction put upon it becomes more palpable: "Give me your pen," said the Farmer; "I never wrote my name, ill as it "may be written, with greater eagerness." Upon which the Gentleman says, "I applaud you, and trust "that your example will be followed by millions." What example?—Arms?—Rebellion?—Disaffection? No!—but that others might add their names to the petition, which he had advised him to sign, until the voice of the whole nation reached Parliament on the subject. This is the plain and obvious construc-

tion; and it is not long since that those persons in Parliament with whom my friend associates, and with whom he acts, affected at least to hold the voice of the people of England to be the rule and guide of Parliament; and the Gentleman in the Dialogue, knowing that the universal voice of the community could not be wisely neglected by the Legislature, only expressed his wish, that the petitions should not be partial, but universal.

With the expression of this wish every thing in the Dialogue upon the subject of representation finally closes; and if you will only honour me with your attentions for a few moments longer, I will show you, that the rest of the pamphlet is the most abstract speculation on government to be found in print; and that I was well warranted when I told you some time ago, that all its doctrines were to be found in the brightest pages of English learning, and in the most sacred volumes of English laws.

The subject of the petition being finished, the Gentleman says, "Another word before we part. "What ought to be the consequence, if THE KING "ALONE were to insist on making laws, or on altering "them at his will and pleasure?" To which the Farmer answers, "He too must be expelled."—"Oh, "but think of his standing army," says the Gentleman, "and of the militia, which now are his in sub-"stance, though ours in form." Farmer, "If he "were to employ that force against the nation, they "would, and ought to resist him, or the state would

"cease to be a state." And now you will see that I am not countenancing rebellion; for if this were pointed to excite resistance to the King's authority, and to lead the people to believe that His Majesty was, in the present course of his government, breaking through the laws, and therefore, on the principles of the constitution, was subject to expulsion, I admit that my Client ought to be expelled from this and every other community. But is this proved?—No! It is not even asserted. I say this in the hearing of a Judge deeply learned in the laws, and who is bound to tell you, that there is nothing in the indictment, which even charges such an application of the general doctrine. The gentleman who drew it is also very learned in his profession; and if he had intended such a charge, he would have followed the rules delivered by the twelve Judges in the House of Lords, in the case of the King against Horne *, and would have set out with saying, that, at the time of publishing the libel in question, there were petitions from all parts of England, desiring a reform in the representation of the people in Parliament;—and that the Defendant knowing this, and intending to stir up rebellion, and to make the people believe, that His Majesty was ruling contrary to law, and ought to be expelled, caused to be published the Dialogue. This would have been the introduction to such a charge; and then when he came to the words, "He

* See Mr. H. Cowper's Reports.

"too must be expelled," he would have said, by way of innuendo, *meaning thereby to insinuate, that the King was governing contrary to law, and ought to be expelled*; which innuendo, though void in itself, without antecedent matter by way of introduction, would, when coupled with the introductory averment on the record, have made the charge complete.—I should have then known what I had to defend my Client against, and should have been prepared with witnesses to show you the absurdity of supposing that the Dean ever imagined, or meant to insinuate, that the present King was governing contrary to law. But the penner of the indictment, well knowing that you never could have found such an application, and that, if it had been averred as the true meaning of the Dialogue, the indictment must have fallen to the ground for want of such finding, prudently omitted the innuendo:—yet you are desired by Mr. Bearcroft, to take that to be the true construction, which the Prosecutor durst not venture to submit to you by an averment in the indictment, and which not being averred, is not at all before you.

But if you attend to what follows, you will observe that the writing is *purely speculative*, comprehending *all* the modes by which a government may be dissolved; for it is followed with the speculative case of injury to a government from bad ministers, and its constitutional remedy. Says the Gentleman, "What, "if the great accountants and great lawyers of the "nation were to abuse their trust, and cruelly injure,

" instead of faithfully serving the public, what in " such case are you to do?" Farmer, " We must " request the King to remove them, and make trial " of others, but none should implicitly be trusted." Request *the King* to remove them! why, according to Mr. Bearcroft, you had expelled *him* the moment before.

Then follows a third speculation of a government dissolved by an aristocracy, the King remaining faithful to his trust; for the Gentleman proceeds thus: " But what, if a few great lords or wealthy " men were to keep the King himself in subjection, " yet exert his force, lavish his treasure, and misuse " his name, so as to domineer over the people and " manage the Parliament?" Says the Farmer, " We must fight for the King and for ourselves." What? for the fugitive King whom the Dean of St. Asaph had before expelled from the crown of these kingdoms! Here again the ridicule of Mr. Bearcroft's construction stares you in the face; but taking it as an abstract speculation of the ruin of a state by aristocracy, it is perfectly plain. When he first puts the possible case of regal tyranny, he states the remedy of expulsion;—when of bad ministers to a good King, the remedy of petition to the throne;—and when he supposes the throne to be overpowered by aristocratic dominion, he then says, " We must " fight for the King and for ourselves."—If there had been but one speculation; viz. of regal tyranny, there might have been plausibility at least in Mr.

Bearcroft's argument; but when so many different propositions are put, altogether repugnant to and inconsistent with each other, common sense tells every man that the writer is speculative, since no state of facts can suit them all.

Gentlemen, these observations, striking as they are, must lose much of their force, unless you carry along with you the writing from which they arise; and therefore I am persuaded that you will be permitted to-day to do what Juries have been directed by Courts to do on the most solemn occasions, that is, to take the supposed libel with you out of court, and to judge for yourselves whether it be possible for any conscientious or reasonable man to fasten upon it any other interpretation, than that which I have laid before you.

If the Dialogue is pursued a little further, it will be seen, that all the exhortations to arms are pointed to the protection of the King's government, and the liberty of the people derived from it. Says the Gentleman, "You talk of fighting as if you were speaking "of some rustic engagement; but your quarter-staff "would avail you little against bayonets." Farmer, "We might easily provide ourselves with better "arms."—"Not so easily," says the Gentleman; "you ought to have a strong firelock." What to do? look at the context,—For God's sake do not violate all the rules of grammar, by refusing to look at the next antecedent!—take care to have a firelock. For what purpose? "to fight for the King and

"yourself," in case the King, who is the fountain of legal government, should be kept in subjection by those great and wealthy lords, who might abuse his authority and insult his title. This, I assert, is not only the genuine and natural construction, but the only legal one it can receive from the Court on this record; since, in order to charge all this to be not merely speculative and abstract, but pointing to the King and his government, to the expulsion of our gracious Sovereign, whom my reverend friend respects and loves, and whose government he reverences as much as any man who hears me, there should have been such an introduction as I have already adverted to, viz. that there were such views and intentions in *others*, and that *He, knowing it, and intending to improve and foment them, wrote so and so*; and then on coming to the words, *that the King must be expelled*, the sense and application should have been pointed by an averment, *that he thereby meant to insinuate to the people of England, that the present King ought in fact to be expelled*; and not speculatively, that under such circumstances it would be lawful to expel a King.

Gentlemen, if I am well founded in thus asserting, that neither in law nor in fact is there any seditious application of those general principles, there is nothing further left for consideration, than to see whether they be warranted in the abstract;—a discussion hardly necessary under the government of His present Majesty, who holds his crown under the act of

settlement, made in consequence of the compact between the King and people at the Revolution. What part you or I, Gentlemen, might have taken, if we had lived in the days of the Stuarts, and in the unhappiest of their days which brought on the Revolution, is foreign to the present question;—whether we should have been found among those glorious names, who from well-directed principle supported that memorable æra, or amongst those who from mistaken principle opposed it, cannot affect our judgments to-day:—whatever part we may conceive we should or ought to have acted, we are bound by the acts of our ancestors, who determined that there existed an original compact between King and people,—who declared, that King James had broken it,—and who bestowed the crown upon another.—The principle of that memorable revolution is fully explained in the Bill of Rights, and forms the most unanswerable vindication of this little book. The misdeeds of King James are drawn up in the preamble to that famous statute; and it is worth your attention, that one of the principal charges in the catalogue of his offences is, that he caused several of those subjects (whose right to carry arms is to-day denied by this indictment) to be disarmed in defiance of the laws.—Our ancestors having stated all the crimes for which they took the crown from the head of their fugitive sovereign, and having placed it on the brows of their deliverer, mark out the conditions on which he is to wear it. They were not to be betrayed by

his great qualities, nor even by the gratitude they owed him, to give him an unconditional inheritance in the throne; but enumerating all their ancient privileges, they tell their new sovereign in the body of the law, that while he maintains these privileges, and no longer than he maintains them, *he is King*.

The same wise caution, which marked the acts of the Revolution, is visible in the act of settlement on the accession of the House of Hanover, by which the crown was again bestowed upon the strict condition of governing according to law,—maintaining the Protestant religion,—and not being married to a Papist.

Under this wholesome entail, *which again vindicates every sentence in this book*, may His Majesty and his posterity hold the crown of these kingdoms for ever!—a wish in which I know I am fervently seconded by my reverend friend, and with which I might call the whole country to vouch for the conformity of his conduct.

But my learned friend, knowing that I was invulnerable here, and afraid to encounter those principles on which his own personal liberty is founded, and on the assertion of which his well-earned character is at stake in the world, says to you with his usual artifice: "Let us admit that there is no sedition in "this Dialogue, let us suppose it to *be* all constitu- "tional and legal, *yet it may do mischief:—why tell "the people so?*"

Gentlemen, I am furnished with an answer to this

objection, which I hope will satisfy my friend, and put an end to all disputes among us; for upon this head I will give you the opinion of Mr. Locke, the greatest Whig that ever lived in this country, and likewise of Lord Bolingbroke, the greatest Tory in it; by which you see that Whigs and Tories, who could never accord in any thing else, were perfectly agreed upon the propriety and virtue of enlightening the people on the subject of government.

Mr. Locke on this subject speaks out much stronger than the Dialogue. He says in his Treatise on Government, "Wherever law ends tyranny be-"gins; and whoever, in authority, exceeds the "power given him by the law, and makes use of "the force he has under his command, to compass "that upon the subject which the law allows not, "ceases in that to be a magistrate, and, acting "without authority, may be opposed as any other "man, who by force invades the rights of another. "This is acknowledged in subordinate magistrates. "He that hath authority by a legal warrant to seize "my person *in the street*, may be opposed as a thief "and a robber, if he endeavours to break *into my house* "to execute it on me there, although I know he has "such a warrant as would have empowered him to "arrest me abroad. And why this should not hold "in the highest as well as in the most inferior ma-"gistrate, I would gladly be informed. For the "exceeding the bounds of authority is no more a "right in a great than in a petty officer, *in a King*

" than *in a constable*; but is so much the worse in " him, that he has more trust put in him, and " more extended evil follows from the abuse of it."

But Mr. Locke, knowing that the most excellent doctrines are often perverted by wicked men, who have their own private objects to lead them to that perversion, or by ignorant men who do not understand them, takes the very objection of my learned friend, Mr. Bearcroft, and puts it as follows into the mouth of his adversary, in order that he may himself answer and expose it: " But there are who say that it " lays a foundation for rebellion,"—Gentlemen, you will do me the honour to attend to this, for one would imagine Mr. Bearcroft had Mr. Locke in his hand when he was speaking.

" But there are who say that it lays a foundation " for rebellion, to tell the people that they are ab- " solved from obedience, when illegal attempts are " made upon their liberties, and that they may op- " pose their magistrates when they invade their pro- " perties, contrary to the trust put in them; and " that, therefore, the doctrine is not to be allowed, " as libellous, dangerous, and destructive of the " peace of the world."—But that great man instantly answers the objection, which he had himself raised in order to destroy it, and truly says, " such men " might as well say, that the people should not be " told that honest men may oppose robbers or pi- " rates, lest it should excite to disorder and blood- " shed."

What reasoning can be more just?—for if we were to argue from the possibility, that human depravity and folly may turn to evil what is meant for good, all the comforts and blessings which God, the author of indulgent nature, has bestowed upon us, and without which we should neither enjoy nor indeed deserve our existence, would be abolished as pernicious, till we were reduced to the fellowship of beasts.

The Holy Gospels could not be promulgated;—for though they are the foundation of all the moral obligations, which unite men together in society, yet the study of them often conducts weak minds to false opinions, enthusiasm, and madness.

The use of pistols should be forbidden;—for, though they are necessary instruments of self-defence, yet men often turn them revengefully upon one another in private quarrels.—Fire ought to be prohibited;—for though, under due regulations, it is not only a luxury but a necessary of life, yet the dwellings of mankind and whole cities are often laid waste and destroyed by it.—Medicines and drugs should not be sold promiscuously;—for though, in the hands of skilful physicians, they are the kind restoratives of nature, yet they may come to be administered by quacks, and operate as poisons. There is nothing, in short, however excellent, which wickedness or folly may not pervert from its intended purpose. But if I tell a man, that if he takes my medicine in the agony of disease, it will expel it by the

violence of its operation, will it induce him to destroy his constitution by taking it while he is in health? Just so, when a writer speculates on all the ways by which human governments may be dissolved, and points out the remedies, which the history of the world furnishes from the experience of former ages; is he, therefore, to be supposed to prognosticate instant dissolution in the existing government, and to stir up sedition and rebellion against it?

Having given you the sentiments of Mr. Locke, published three years after the accession of King William, who caressed the author, and raised him to the highest trust in the state, let us look at the sentiments of a Tory, on that subject, not less celebrated in the republic of letters, and on the theatre of the world:—I speak of the great Lord Bolingbroke, who was in arms to restore King James to his forfeited throne, and who was anxious to rescue the Jacobites from what he thought a scandal on them, namely the imputation, that, because from the union of so many human rights centred in the person of King James, they preferred and supported his hereditary title on the footing of our own ancient civil constitutions, they, therefore, believed in his claim to govern *jure divino*, independent of the law.

This doctrine of passive obedience, which the Prosecutor of this libel must successfully maintain to be the law, and which certainly is the law, if this Dialogue be a libel, was resented above half a century ago by this great writer, even in a tract written

while an exile in France on account of his treason against the House of Hanover. "The duty of the "people," says his Lordship, "is now settled upon "so clear a foundation, that no man can hesitate how "far he is to obey, or doubt upon what occasions "he is to resist. Conscience can no longer battle "with the understanding: we know that we are "to defend the crown with our lives and fortunes, "as long as the crown protects us, and keeps strictly "to the bounds within which the laws have con-"fined it. We know likewise, that we are to do it "no longer."

Having finished three volumes of masterly and eloquent discussions on our government, he concludes, with stating the duty imposed on every enlightened mind to instruct the people on the principles of our government, in the following animated passage: "The whole tendency of these discourses is to in-"culcate a rational idea of the nature of our free "government into the minds of all my countrymen, "and to prevent the fatal consequence of those slavish "principles, which are industriously propagated "through the kingdom, by wicked and designing "men. He who labours to blind the people, and "to keep them from instruction on those momen-"tous subjects, may be justly suspected of sedition "and disaffection; but he who makes it his busi-"ness to open the understandings of mankind, by "laying before them the true principles of their go-"vernment, cuts up all faction by the roots; for it

" cannot but interest the people in the preservation " of their constitution, when they know its excel- " lence and its wisdom."

But, says Mr. Bearcroft, again and again, " are " the multitude to be told all this ?" I say as often on my part, YES. I say, that nothing can preserve the government of this free and happy country, in which under the blessing of God we live;—that nothing can make it endure to all future ages, but its excellence and its wisdom being known, not only to you and the higher ranks of men, who may be overborne by a contentious multitude, but also to the great body of the people, by disseminating among them the true principles on which it is established; which show them, that they are not the hewers of wood and the drawers of water to men who avail themselves of their labour and industry;—but that government is a *trust* proceeding from *themselves*;—an emanation from their own strength;—a benefit and a blessing, which has stood the test of ages;—that they are governed because they desire to be governed, and yield a voluntary obedience to the laws, because the laws protect them in the liberties they enjoy.

Upon these principles I assert with men of all denominations and parties, who have written on the subject of free governments, that this Dialogue, so far from misrepresenting or endangering the constitution of England, disseminates obedience and affection to it as far as it reaches;—and that the comparison of the great political institutions with the little

club in the village, is a decisive mark of the honest intention of its author.

Does a man rebel against the president of his club while he fulfils his trust?—No: because he is of his own appointment, and acting for his comfort and benefit. This safe and simple analogy, lying within the reach of every understanding, is therefore adopted by the scholar as the vehicle of instruction; who, wishing the peasant to be sensible of the happy government of this country, and to be acquainted with the deep stake he has in its preservation, truly tells him, that a nation is but a great club, governed by the same consent, and supported by the same voluntary compact; impressing upon his mind the great theory of public freedom, by the most familiar allusions to the little but delightful intercourses of social life, by which men derive those benefits, that come home the nearest to their bosoms.

Such is the wise and innocent scope of this Dialogue, which, after it had been repeatedly published without censure, and without mischief, under the public eye of Government in the capital, is gravely supposed to have been circulated by my reverend friend many months afterwards, with a malignant purpose to overturn the monarchy by an armed rebellion.

Gentlemen, if the absurdity of such a conclusion, from the scope of the Dialogue itself, were not self-evident, I might render it more glaring by adverting to the condition of the publisher. The affectionate

son of a Reverend Prelate * not more celebrated for his genius and learning than for his warm attachment to the constitution, and in the direct road to the highest honours and emoluments of that very church, which, when the monarchy falls, must be buried in its ruins:—nay, the publisher a dignitary of the same church himself at an early period of his life, and connected in friendship with those, who have the dearest stakes in the preservation of the government, and who, if it continues, may raise him to all the ambitions of his profession. I cannot therefore forbear from wishing that somebody, in the happy moments of fancy, would be so obliging as to invent a reason, in compassion to our dulness, why my reverend friend should aim at the destruction of the present establishment; since you cannot but see, that the moment he succeeded, down comes his father's mitre, which leans upon the crown;—away goes his own deanery, with all the rest of his livings; and neither you nor I have heard any evidence to enable us to guess what he is looking for in their room.—In the face nevertheless of all these absurdities, and without a colour of evidence from his character or conduct in any part of his life, he is accused of sedition, and under the false pretence of public justice, dragged out of his own country, deprived of that trial by his neighbours, which is the right of the meanest man who hears me, and arraigned

* Dr. Shipley then Bishop of St. Asaph.

before you, who are strangers to those public virtues which would in themselves be an answer to this malevolent accusation. But when I mark your sensibility and justice in the anxious attention you are bestowing, when I reflect upon your characters, and observe from the pannel (though I am personally unknown to you) that you are men of rank in this county, I know how these circumstances of injustice will operate:—I freely forgive the Prosecutor for having fled from his original tribunal.

Gentlemen, I come now to a point very material for your consideration;—on which even my learned friend and I, who are brought here for the express purpose of disagreeing in every thing, can avow no difference of opinion;—on which judges of old and of modern times, and lawyers of all interests and parties, have ever agreed; namely, that even if this innocent paper were admitted to be a libel, the publication would not be criminal, if you, the Jury, saw reason to believe that it was not published by the Dean with a criminal intention. It is true, that if a paper containing seditious and libellous matter be published, the publisher is *prima facie* guilty of sedition, the bad intention being a legal inference from the act of publishing: but it is equally true, that he may rebut that inference, by showing that he published it innocently.

This was declared by Lord Mansfield, in the case of the King and Woodfall: where his Lordship said, that the fact of publication would in that instance

have constituted guilt, if the paper was a libel: because the Defendant had given no evidence to the Jury to repel the legal inference of guilt, as arising from the publication; but he said at the same time, in the words that I shall read to you, that such legal inference was to be repelled by proof.

"There may be cases where the fact of the publi-
"cation even of a libel may be justified or excused
"as lawful or innocent; for no fact which is not
"criminal, even though the paper be a libel, can
"amount to a publication of which a Defendant
"ought to be found guilty."

I read these words from Burrow's Reports, published under the eye of the Court, and they open to me a decisive defence of the Dean of St. Asaph upon the present occasion, and give you an evident jurisdiction to acquit him, even if the law upon libels were as it is laid down to you by Mr. Bearcroft: for if I show you, that the publication arose from motives that were innocent, and not seditious, he is not a criminal publisher, even if the Dialogue were a libel, and, according even to Lord Mansfield, ought not to be found guilty.

The Dean of St. Asaph was one of a great many respectable gentlemen, who, impressed with the dangers impending over the public credit of the nation, exhausted by a long war, and oppressed with grievous taxes, formed themselves into a committee, according to the example of other counties, to petition the Legislature to observe great caution in the expenditure of the public money. This Dialogue,

written by Sir William Jones, a near relation of the Dean by marriage, was either sent, or found its way to him in the course of public circulation. He knew the character of the author; he had no reason to suspect him of sedition or disaffection; and believed it to be, what I at this hour believe, and have represented it to you, a plain, easy manner of showing the people the great interest they had in petitioning Parliament for reforms beneficial to the public. It was accordingly the opinion of the Flintshire committee, and not particularly of the Dean as an individual, that the Dialogue should be translated into Welsh, and published. It was accordingly delivered, at the desire of the committee, to a Mr. Jones, for the purpose of translation. This gentlemen, who will be called as a witness, told the Dean a few days afterwards, that there were persons, not indeed from their real sentiments, but from spleen and opposition, who represented it as likely to do mischief, from ignorance and misconception, if translated and circulated in Wales.

Now, what would have been the language of the Defendant upon this communication, if his purpose had been that which is charged upon him by the indictment? He would have said, "If what you tell "me is well-founded, *hasten the publication*; I am "sure I shall never raise discontent here, by the dis-"semination of such a pamphlet in English:—there-"fore let it be instantly translated, if the ignorant

" inhabitants of the mountains are likely to collect " from it, that it is time to take up arms."

But Mr. Jones will tell you, that, on the contrary, the instant he suggested that such an idea, absurd and unfounded as he felt it, had presented itself, from any motives, to the mind of any man, the Dean, impressed as he was with its innocence and its safety, instantly acquiesced;—he recalled, even on his own authority, the intended publication by the committee; and it never was translated into the Welsh tongue at all.

Here the Dean's connexion with this Dialogue would have ended, if Mr. Fitzmaurice, who never lost any occasion of defaming and misrepresenting him, had not thought fit, near three months after the idea of translation was abandoned, to reprobate and condemn the Dean's conduct at the public meetings of the county in the severest terms, for his former intention of circulating the Dialogue in Welsh,—declaring that its doctrines were *seditious, treasonable, and repugnant to the principles of our government.*

It was upon this occasion that the Dean, naturally anxious to redeem his character from the unjust aspersions of having intended to undermine the constitution of his country,—conscious that the epithets applied to the Dialogue were false and unfounded,—and thinking that the production of it would be the most decisive refutation of the groundless calumny cast upon him, directed a few English copies of it

to be published in vindication of his former opinions and intentions, prefixing an advertisement to it, which plainly marks the spirit in which he published it. For he there complains of the injurious misrepresentations I have adverted to, and impressed with the sincerest conviction of the innocence, or rather the merit of the Dialogue, makes his appeal to the friends of the Revolution in his justification.

[*Mr. Erskine here read the advertisement to the Jury, as prefixed to the Dialogue.*]

Now, Gentlemen, if you shall believe upon the evidence of the witness to these facts, and of the advertisement prefixed to the publication itself (which is artfully kept back, and forms no part of the indictment), that the Dean, upon the authority of Sir William Jones who wrote it,—of the other great writers on the principles of our government,—and of the history of the country itself, really thought the Dialogue innocent and meritorious, and that his single purpose in publishing the English copies, after the Welsh edition had been abandoned, was the vindication of his character from the imputation of sedition,—then he is not guilty upon this indictment, which charges the publication with a wicked intent to excite disaffection to the King, and rebellion against his government.

Actus non facit reum nisi mens sit rea, is the great maxim of penal justice, and stands at the top of the criminal page, in every volume of our humane and sensible laws. The hostile *mind* is the crime

which it is your duty to decipher;—a duty which I am sure you will discharge with the charity of Christians;—refusing to adopt a harsh and cruel construction, when one that is fair and honourable is more reconcilable, not only with all probabilities, but with the evidence which you are sworn to make the foundation of your verdict. The Prosecutor rests on the single fact of publication, without the advertisement, and without being able to cast an imputation upon the Defendant's conduct;—or even an observation to assign a motive to give verisimilitude to the charge.

Gentlemen, after the length of time, which, very contrary to my inclination, I have detained you, I am sure you will be happy to hear that there is but one other point to which my duty obliges me to direct your attention. I should, perhaps, have said nothing more concerning the particular province of a Jury upon this occasion, than the little I touched upon it at the beginning, if my friend Mr. Bearcroft had not compelled me to it, by drawing a line around you, saying (I hope with the same effect that King Canute said to the sea), "Thus far shalt thou go." But since he has thought proper to coop you in, it is my business to let you out:—and to give the greater weight to what I am about to say to you, I have no objection that every thing which I may utter shall be considered as proceeding from my own private opinions; and that not only my professional character, but my more valuable reputation as a man, may stand

or fall by the principles which I shall lay down for the regulation of your judgments.

This is certainly a bold thing to say, since what I am about to deliver may clash in some degree *(though certainly it will not throughout)* with the decision of a great and reverend Judge, who has administered the justice of this country for above half a century with singular advantage to the public, and distinguished reputation to himself; but whose extraordinary faculties and general integrity, which I should be lost to all sensibility and justice if I did not acknowledge with reverence and affection, could not protect him from severe animadversion when he appeared as the supporter of those doctrines which I am about to controvert. I shall certainly never join in the calumny that followed them, because I believe he acted upon that, as upon all other occasions, with the strictest integrity;—an admission which it is my duty to make, which I render with great satisfaction, and which proves nothing more, than that the greatest of men are fallible in their judgments, and warns us to judge from the essences of things, and not from the authority of names, however imposing.

Gentlemen, the opinion I allude to is, that *libel or not libel* is a question of *law* for the Judge, *your* jurisdiction being confined to the *fact of publication*. And if this were all that was meant by the position (though I could never admit it to be consonant with reason or law), it would not affect me in the present

instance, since all that it would amount to would be, that the Judge, and not you, would deliver the only opinion which can be delivered from that quarter upon this subject. But what I am afraid of upon this occasion is, that *neither of you are to give it*; for so my friend has expressly put it. "My Lord," says he, "will probably not give you his opinion "whether it be a libel or not, because, as he will "tell you, it is a question open upon the record, "and that if Mr. Erskine thinks the publication in- "nocent, he may move to arrest the judgment." Now this is the most artful and the most mortal stab that can be given to justice, and to my innocent Client. All I wish for is, that the judgment of the Court should be a guide to yours in determining, whether this pamphlet be or be not a libel;—because, knowing the scope of the learned Judge's understanding and professional ability, I have a moral certainty that his opinion would be favourable. If therefore libel or no libel be a question of law, as is asserted by Mr. Bearcroft, I call for his Lordship's judgment upon that question, according to the regular course of all trials, where the law and the fact are blended; in all which cases the notorious office of the Judge is to instruct the consciences of the Jury, to draw a correct legal conclusion from the facts in evidence before them. A Jury are no more bound to return a special verdict in cases of libel, than upon other trials criminal and civil, where law is mixed with fact:—they are to find generally upon

both, receiving, as they constantly do in every Court at Westminster, the opinion of the Judge both on the evidence and the law.

Say the contrary who will, I assert this to be the genuine, unrepealed constitution of England; and therefore, if the learned Judge shall tell you that this pamphlet is in the abstract a libel; though I shall not agree that you are therefore *bound* to find the Defendant guilty unless you think so likewise, yet I admit his opinion ought to have very great weight with you, and that you should not rashly, nor without great consideration, go against it.—But, if *you* are only to find the *fact of publishing*, which is not even disputed; and the Judge is to tell you, that the matter of libel being on the record, *he shall shut himself up in silence, and give no opinion at all as to the libellous and seditious tendency of the paper, and yet shall nevertheless expect you to affix the epithet of* GUILTY *to the publication of a thing, the* GUILT *of which* YOU *are forbid, and* HE *refuses to examine*;—miserable indeed is the condition into which we are fallen! Since if you, following such directions, bring in a verdict of guilty, without finding the publication to be a libel, or the publisher seditious; and I afterwards, in mitigation of punishment, shall apply to that humanity and mercy which is never deaf, when it can be addressed consistently with the law; I shall be told in the language I before put in the mouths of the Judges, "You are "estopped, Sir, by the verdict: we cannot hear

" you say your Client was mistaken, but NOT " GUILTY; for, had *that* been the opinion of the " Jury, they had a jurisdiction to *acquit* him."

Such is the way in which the liberties of Englishmen are by this new doctrine to be shuffled about from jury to court, without having any solid foundation to rest on. I call this the effect of *new* doctrines, because I do not find them supported by that current of ancient precedents which constitutes English law. The history of seditious libels is perhaps one of the most interesting subjects which can agitate a Court of Justice, and my friend thought it prudent to touch but very slightly upon it.

We all know, that by the immemorial usage of this country, no man in a criminal case could ever be compelled to plead a special plea;—for although our ancestors settled an accurate boundary between law and fact, obliging the party defendant who could not deny the latter to show his justification to the Court; yet a man accused of a crime had always a right to throw himself by a general plea upon the justice of his peers; and on such general issue, his evidence to the Jury might ever be as broad and general as if he had pleaded a special justification. The reason of this distinction is obvious.—The rights of property depend upon various intricate rules, which require much learning to adjust, and much precision to give them stability; but CRIMES consist wholly in intention; and of that which passes in the breast of an Englishman as the motives of his actions, none

but an English Jury shall judge.—It is therefore impossible, in most criminal cases, to separate law from fact; and consequently whether a writing be or be not a libel, *never can be an abstract legal question for Judges*. And this position is proved by the immemorial practice of courts, the forms of which are founded upon legal reasoning; for that very libel, over which it seems you are not to entertain any jurisdiction, is always read, and often delivered to you out of Court for your consideration.

The administration of criminal justice in the hands of the people, is the basis of all freedom. While that remains there can be no tyranny, because the people will not execute tyrannical laws on themselves. Whenever it is lost, liberty must fall along with it, because the sword of justice falls into the hands of men, who, however independent, have no common interest with the mass of the people. Our whole history is therefore chequered with the struggles of our ancestors to maintain this important privilege, which in cases of libel has been too often a shameful and disgraceful subject of controversy.

The ancient government of this country not being founded, like the modern, upon public consent and opinion, but supported by ancient superstitions, and the lash of power, saw the seeds of its destruction in a free press. Printing therefore, upon the revival of letters, when the lights of philosophy led to the detection of prescriptive usurpations, was considered as a matter

of state, and subjected to the controul of licencers appointed by the Crown: and although our ancestors had stipulated by Magna Charta, that no freeman should be judged but by his peers, the Courts of Star-chamber and High Commission, consisting of privy-counsellors erected during pleasure, opposed themselves to that freedom of conscience and civil opinion, which *even then* were laying the foundations of the Revolution. Whoever wrote on the principles of government was pilloried in the Star-chamber, and whoever exposed the errors of a false religion was persecuted in the Commission-court. But no power can supersede the privileges of men in society, when once the lights of learning and science have arisen amongst them. The prerogatives which former princes exercised with safety, and even with popularity, were not to be tolerated in the days of the First Charles, and our ancestors insisted that these arbitrary tribunals should be abolished. Why did they insist upon their abolition?—Was it that the question of libel, which was their principal jurisdiction, should be determined only by the Judges at Westminster?—In the present times even such a reform, though very defective, might be consistent with reason, because the Judges are now, honourable, independent, and sagacious men; but in those days they were often wretches,—libels upon all judicature;—and instead of admiring the wisdom of our ancestors, if that had been their policy, I should have held them up as lunatics, to the scoff of pos-

terity; since in the times when these unconstitutional tribunals were supplanted, the Courts of Westminster Hall were filled with men who were equally the tools of power with those in the Star-chamber;—and the whole policy of the change consisted in that principle, which was then never disputed, viz. That the Judges at Westminster in criminal cases were but a part of the Court, and could only administer justice through the medium of a Jury.

When the people, by the aid of an upright Parliament, had thus succeeded in reviving the constitutional trial by the country, the next course taken by the ministers of the Crown, was to pollute what they could not destroy.—Sheriffs devoted to power were appointed, and corrupt Juries packed to sacrifice the rights of their fellow-citizens, under the mask of a popular trial. This was practised by Charles the Second; and was made one of the charges against King James, for which he was expelled the kingdom.

When Juries could not be found to their minds, Judges were daring enough to browbeat the Jurors, and to dictate to them what they called the law; and in Charles the Second's time an attempt was made, which, if it had proved successful, would have been decisive. In the year 1670 Penn and Mead, two Quakers, being indicted for *seditiously* preaching to a multitude *tumultuously* assembled in Gracechurch Street, were tried before the Recorder of London,

who told the Jury that they had nothing to do but to find whether the Defendants had preached or not; for that, whether the matter or the intention of their preaching were seditious, were questions of law and not of fact, which they were to keep to at their peril. The Jury, after some debate, found Penn guilty of speaking to people in Gracechurch Street; and on the Recorder's telling them that they meant, no doubt, that he was speaking to a *tumult* of people there; he was informed by the foreman, that they allowed of no such words in their finding, but adhered to their former verdict. The Recorder refused to receive it, and desired them to withdraw, on which they again retired, and brought in a general verdict of acquittal; which the Court considering as a contempt, set a fine of forty marks upon each of them, and condemned them to lie in prison till it was paid. Edward Bushel, one of the Jurors (to whom we are almost as much indebted as to Mr. Hampden, who brought the case of ship-money before the Court of Exchequer) refused to pay his fine, and, being imprisoned in consequence of the refusal, sued out his writ of Habeas Corpus, which, with the cause of his commitment *(viz. his refusing to find according to the direction of the Court in matter of law)*, was returned by the Sheriffs of London to the Court of Common Pleas; when Lord Chief Justice Vaughan, to his immortal honour, delivered his opinion as follows:—

"We must take off this veil and colour of words, which

" make a show of being something, but are in fact " nothing. If the meaning of these words, *finding* " *against the direction of the Court in matter of law*, " be, that if the Judge, having heard the evidence given " in Court (for he knows no other), shall tell the " Jury upon this evidence, that the law is for the " Crown, and they, under the pain of fine and impri- " sonment, are to find accordingly; every man sees " that the Jury is but a troublesome delay, great " charge, and of no use in determining right and " wrong; and therefore the trials by them may be " better abolished than continued; which were a " strange and new-found conclusion, after a trial so " celebrated for many hundreds of years in this " country."

He then applied this sound doctrine with double force to criminal cases, and discharged the upright Juror from his illegal commitment.

This determination of the right of Juries to find a general verdict was never afterwards questioned by succeeding Judges; not even in the great case of the seven Bishops, on which the dispensing power and the personal fate of King James himself in a great measure depended.

These conscientious Prelates were, you know, imprisoned in the Tower, and prosecuted by information for having petitioned King James the Second to be excused from reading in their churches the declaration of indulgence, which he had published contrary to law. The trial was had at the bar of the

Court of King's Bench, when the Attorney General of that day, rather more peremptorily than my learned friend (who is much better qualified for that office, and whom I should be glad to see in it), told the Jury, *that they had nothing to do but with the bare fact of publication*, and said he should therefore make no answer to the arguments of the Bishops' counsel, as to whether the petition was or was not a libel. But Chief Justice Wright (no friend to the liberty of the subject, and with whom I should be as much ashamed to compare my Lord, as Mr. Bearcroft to that Attorney General) interrupted him, and said, "Yes, Mr. Attorney, I will tell you what they "offer, *which it will lie upon you to answer:* they "would have you show the Jury how this petition "has disturbed the government, or diminished the "King's authority." So say I. I would have Mr. Bearcroft show you, Gentlemen, how this Dialogue has disturbed the King's government,—excited disloyalty and disaffection to his person,—and stirred up disorders within these kingdoms.

In the case of the Bishops, Mr. Justice Powell followed the Chief Justice, saying to the Jury, "I "have given my opinion; *but the whole matter is* "*before you, gentlemen, and you will judge of it.*" Nor was it withdrawn from their judgment; for although the majority of the Court were of opinion that it was a libel, and had so publicly declared themselves from the Bench, yet by the unanimous decision of all the Judges, after the Court's own

opinion had been pronounced by way of charge to the Jury, the petition itself, which contained no innuendos to be filled up as facts, was delivered into their hands to be carried out of Court, for their deliberation. The Jury accordingly withdrew from the bar, carrying the libel with them; and (puzzled I suppose, by the infamous opinion of the Judges) were most of the night in deliberation;—all London surrounding the Court with anxious expectation for that verdict, which was to decide whether Englishmen were to be freemen or slaves. Gentlemen, the decision was in favour of freedom, for the reverend fathers were acquitted; and though acquitted in direct opposition to the judgment of the Court, yet it never occurred even to those arbitrary Judges who presided in it to cast upon them a censure or a frown. This memorable and never to be forgotten trial is a striking monument of the importance of these rights, which no Juror should ever surrender; for if the legality of the petition had been referred as a question of law to the Court of King's Bench, the Bishops would have been sent back to the Tower,—the dispensing power would have acquired new strength,—and perhaps the glorious æra of the Revolution and our present happy constitution might have been lost.

Gentlemen, I ought not to leave the subject of these doctrines, which in the libels of a few years past were imputed to the noble Earl of whom I formerly spoke, without acknowledging that Lord Mans-

field was neither the original composer of them, nor the copier of them from these impure sources: it is my duty to say, that Lord Chief Justice Lee, in the case of the King against Owen, had recently laid down the same opinions before him. But then both of these great Judges always conducted themselves on trials of this sort, as the learned Judge will no doubt conduct himself to-day; they considered the Jury as open to all the arguments of the Defendant's counsel. And in the very case of Owen, who was acquitted against the direction of the Court, the present Lord Camden addressed the Jury, not as I am addressing you, but with all the eloquence for which he is so justly celebrated. The *practice*, therefore, of these great Judges is a sufficient answer to their *opinions*; for if it be the law of England, that the Jury may not decide on the question of libel, the same law ought to extend its authority to prevent their being told by counsel that they may.

There is indeed no end of the absurdities which such a doctrine involves; for suppose that this Prosecutor, instead of indicting my reverend friend for publishing this Dialogue, had indicted him for publishing the Bible, beginning at the first book of Genesis, and ending at the end of the Revelations, without the addition or subtraction of a letter, and without an *innuendo* to point out a libellous application, only putting in at the beginning of the indictment that he published it with a blasphemous intention:—On the trial for such a publication Mr.

Bearcroft would gravely say, "Gentlemen of the "Jury, you must certainly find by your verdict, "that the Defendant is guilty of this indictment, i. e. "guilty of publishing the Bible with the intentions "charged by it. To be sure, every body will laugh "when he hears it, and the conviction can do the "Defendant no possible harm; for the Court of "King's Bench will determine that it is not a libel, "and he will be discharged from the consequences of "the verdict."—Gentlemen, I defy the most ingenious man living to make a distinction between that case and the present; and in this way you are desired to sport with your oaths, by pronouncing my reverend friend to be a criminal, without either determining yourselves, or having a determination, or even an insinuation from the Judge that any crime has been committed; following strictly that famous and respectable precedent of Rhadamanthus, judge of hell, who punishes first, and afterwards institutes an inquiry into the guilt.

But it seems your verdict would be no punishment, if judgment on it was afterwards arrested. I am sure, if I had thought the Dean so lost to sensibility, as to feel it no punishment, he must have found another counsel to defend him. But I know his nature better. Conscious as he is of his own purity, he would leave the Court hanging down his head in sorrow, if he were held out by your verdict a seditious subject, and a disturber of the peace of his country. The arrest of judgment, which would follow in the term upon his appearance in Court as

a convicted criminal, would be a cruel insult upon his innocence, rather than a triumph over the unjust prosecutors of his pretended guilt.

Let me, therefore, conclude with reminding you, Gentlemen, that if you find the Defendant guilty, not believing the thing published to be a libel, or the intention of the publisher seditious, your verdict and your opinions will be at variance, and it will then be between God and your own consciences to reconcile the contradiction.

SUBJECT

OF THE

TRIAL OF THE DEAN OF ST. ASAPH.

TO enable the reader to understand thoroughly the further proceedings in this memorable cause, and more particularly to assist him in appreciating the vast value and importance of the Libel Bill, which it gave rise to, it becomes necessary to insert at full length Mr. Justice Buller's Charge to the Jury, and what passed in Court before the verdict was recorded; by which it will appear that the rights of Juries, as often established by act of Parliament, had been completely abandoned by all the profession except by Mr. Erskine. The doctrine insisted and acted upon was, that the Jury were confined to the mere act of publishing, and were bound by their oaths to convict of a libel, whatever might be the matter written or published:—a course of proceeding which placed the British press entirely in the hands of fixed magistrates, appointed by the Crown. This doctrine, we say, was so completely fastened upon the public, that the reader will find in the fifth volume of Sir James Burrow's Reports upon the trial of Woodfall for publishing the Letters of Junius, alluded to by Mr. Justice Buller in his Charge to the Jury at Shrewsbury, that an objection to that rule of law, as delivered by Lord Mansfield, was considered to be perfectly frivo-

lous:—the next time after that decision when it appears to have been again insisted upon, in the trial of the Rev. Mr. Bate Dudley for a libel in the Morning Herald on the Duke of Richmond, Lord Mansfield told Mr. Erskine the moment he touched upon it in his speech to the Jury, that "it was strange he should "be contesting points now, which the greatest lawyers in the Court had submitted to for years before "he was born." The Jury, however, acquitted Mr. Dudley notwithstanding, and Mr. Erskine continued to oppose the false doctrine, which was at last so completely exposed and disgraced by the following speeches in this cause, that Mr. Fox thought the time at last ripe for the introduction of the Libel Bill, which he moved soon after in the House of Commons, and was seconded by Mr. Erskine. The merits of this most excellent statute, which redeemed and we trust established for ever the liberty of the press, and the rights of British Juries, will be more easily explained and better understood by perusing the following speeches, which produced at the time a perfect unanimity upon the subject. We have as a supplement to this volume printed the Libel Bill itself, and annexed a few observations upon it.

MR. JUSTICE BULLER'S CHARGE.

GENTLEMEN OF THE JURY,

THIS is an indictment against William Shipley, for publishing the pamphlet which you have heard, and which the indictment states to be a libel.

The Defendant has pleaded that he is not guilty; and whether he is guilty *of the fact* or not, is the matter for you to decide. On the part of the prosecution to prove the publication, they have called Mr. Edwards, who says, that the words Gentleman and Farmer in the pamphlet, which he now produces, are the Dean of St. Asaph's hand-writing. He received the pamphlet, which he now produces, from the Dean, with the directions which he has also produced, and which have been read to you: *those directions are for him to get it printed with an advertisement affixed to it, which is contained in that letter which has been read,* which appears to be dated the 24th of January 1783; and in consequence of that letter, which desires him to get the inclosed Dialogue printed, he sent it to Marsh, a printer, according to the directions contained in the letter. John Marsh says, this pamphlet was printed at their office, from what was sent by Mr. Edwards. After some copies were struck off he saw the Dean; he told him Mr. Jones had had several copies.

The Dean seemed then quite surprised that any stir should be made about it.—William Jones is then called, who says he bought the second pamphlet produced, from Marsh in the month of February 1783. He says, he is the Prosecutor of the indictment; then he told you that he applied to the Treasury about the prosecution, and they did not take it up. This is the whole of the evidence for the prosecution. For the Defendant, Edward Jones has been called, who says, he was a member of the Flintshire committee:—that it was intended by them to print this Dialogue in Welsh:—that the Dean said he had received the pamphlet so late from Sir William Jones, that he had not had time to read it; he says, he told the Dean that he had collected the opinions of gentlemen, which were, that it might do harm: after that the Dean told him, that he was obliged to him for his information, that he should be sorry to publish any thing that tended to sedition; and it was for this reason that it was not published in Welsh. This passed on the 7th of January 1783. Some time after, Mr. Shipley said he would read it, to show it was not so seditious, but that he read it with a rope about his neck; and when he had read it, he gave his opinion he did not think it quite so bad.

Mr. Erskine. I ask your Lordship's pardon. I believe the witness said it was at the county meeting where the Dean said this.

Mr. Jones. It was the same day, the 7th of January.

Mr. Justice Buller. Yes, afterwards, at the county meeting, he said he would read it to show it was not so seditious, but that he read it with a rope about his neck; when he had read it, he said he did not think it so bad. Then he called five gentlemen who spoke to his character. Sir Watkyn Williams Wynne says, he has known the Defendant eight or nine years; he does not think him a man likely to be guilty of that which is now imputed to him. Sir Roger Mostyn, who is Lord-Lieutenant of Flintshire, says he has known the Defendant several years: that he put him into the commission of the peace, and appointed him a Deputy Lieutenant; that in his opinion he don't think the Defendant capable of stirring up sedition or rebellion. Major Williams says, he has no reason to believe the Defendant capable of being guilty of the crime imputed to him; on the contrary, he thinks he would be the first that would quell sedition. Colonel Myddelton says, he has known the Dean of St. Asaph near twelve years; that he has attended with the Dean at private meetings of the Justices, and at quarter sessions, and in his judgment the King has not a better subject. Bennet Williams likewise says, he has known the Dean many years; that the Defendant is a peaceable man, not capable of stirring up sedition, and he thinks he is as peaceable a subject as any the King has.—Now, Gentlemen, this is the whole of the evidence that has been given on the one side and the other. *As to the several witnesses who have been*

called to give Mr. Shipley the character of a quiet and peaceable man, not disposed to stir up sedition, that cannot govern the present case, for the question for you to decide is, WHETHER HE IS OR IS NOT GUILTY OF PUBLISHING THIS PAMPHLET?

You have heard a great deal said which really does not belong to the case, and a part of it has embarrassed me a good deal in what manner to treat it. I cannot subscribe to a great deal I have heard from the Defendant's Counsel, but I do readily admit the truth and wisdom of that proposition which he stated from Mr. Locke, that, "wherever the law ends, tyranny "begins." The question then is, What is the law as applicable to this business? and, to narrow it still more, What is the law in this stage of the business? *You have been pressed very much by the Counsel, and so have I also, to give an opinion upon the question, whether this pamphlet is or is not a libel. Gentlemen, it is my happiness that I find the law so well and so fully settled, that it is impossible for any man who means well to doubt about it*; and the Counsel for the Defendant was so conscious that the law was so settled, that he himself stated what he knew must be the answer which he would receive from me: that is, that the matter appears upon the record; and as such, it is not for me, a single Judge sitting here *at Nisi Prius*, to say whether it is or is not a libel. Those who adopt the contrary doctrine, forget a little to what lengths it would go; for if that were to be allowed, the obvious consequence would be what

was stated by the Counsel in reply; namely, that you deprive the subject of that which is one of his dearest birthrights:—you deprive him of his appeal; you deprive him of his writ of error: for if I was to give an opinion here, that it was not a libel, and you adopted that, the matter is closed for ever. The law acts equally and justly, as the pamphlet itself states; it is equal between the Prosecutor and the Defendant; and whatever appears upon the record is not for our decision here, but may be the subject of future consideration in the Court out of which the record comes; and afterwards, if either party thinks fit, they have a right to carry it to the dernier resort, and have the opinion of the House of Lords upon it; and therefore that has been the uniform and established answer, not only in criminal but civil cases: the law is the same in both, and there is not a gentleman round this table who does not know that is the constant and uniform answer which is given in such cases. *You have been addressed by the quotation of a great many cases upon libels. It seems to me that that question is so well settled, that gentlemen should not agitate it again; or at least, when they do agitate it, it should be done by stating fairly and fully what has passed on all sides, not by stating a passage or two from a particular case that may be twisted to the purpose that they want it to answer*; AND HOW THIS DOCTRINE EVER COMES TO BE NOW SERIOUSLY CONTENDED FOR, IS A MATTER OF SOME ASTONISHMENT TO ME; FOR I DO NOT KNOW ANY ONE QUESTION

IN THE LAW WHICH IS MORE THOROUGHLY ESTABLISHED THAN THAT IS. I know it is not the language of a particular set or party of men, because the very last case that has ever arisen upon a libel, was conducted by a very respectable and a very honourable man, who is as warm a partisan (and upon the same side of the question) as the Counsel for the Defendant, and I believe of what is called the same party. But he stated the case in a few words, which I certainly adopted afterwards, and which I believe, no man ever doubted about the propriety of. That case arose not three weeks ago at Guildhall, upon a question on a libel; and in stating the plaintiff's case, he told the Jury, that there could be but three questions.

The first is, Whether the Defendant is guilty of publishing the libel?

The second, Whether the innuendos or the averments made on the record, are true?

The third, which is a question of law, Whether it is a libel or not?—Therefore, said he *, the two first are the only questions you have to consider: and this, added he very rightly, is clear and undoubted law; it was adopted by me as clear and undoubted law, and it has been so held for considerably more than a century past. It is indeed admitted by the Counsel, that upon great consideration it has been so held in one of the cases he mentioned, by a noble

* Mr. John Lee, then Attorney General.

Lord who has presided a great many years, with very distinguished honour, in the first court of criminal justice in this country; and it is worthy of observation, how that case came on. For twenty-eight years past, during which time we have had a vast number of prosecutions in different shapes for libels, the uniform and invariable conduct of that noble Judge has been to state the questions as I have just stated them to you; and though the cases have been defended by Counsel not likely to yield much, yet that point was never found fault with by them; and often as it has been enforced by the Court, they never have attempted yet by any application to set it aside; at last it came on in this way—the noble Judge himself brought it on by stating to the Court what his directions had always been, with a desire to know whether, in their opinions, the direction was right or wrong? The Court was unanimously of opinion that it was right, and that the law bore no question or dispute. It is admitted by the Counsel likewise, that in the time that Lord Chief Justice Lee presided in the Court of King's Bench the same doctrine was laid down as clear and established; a sounder lawyer, or a more honest man, never sat on the Bench than he was. But if we trace the question further back, it will be found that about the year 1731 (which I suppose has not escaped the diligence of the Counsel) another Chief Justice held the same doctrine, and in terms which are more observable than those in most of the other cases, be-

cause they show pretty clearly when and how it was that this idea was first broached. That was an information against one Franklin, I think, for publishing a libel, called the *Craftsman*. The then Chief Justice stated the three questions to the Jury in the same way I mentioned. He said, "The first is as to the "fact of publication. Secondly, Whether the "averments in the information are true or not? "And thirdly, Whether it is a libel?" He says, "There are but two questions for your consider- "ation; the third is merely a question of law, with "which you the Jury have nothing to do, as has "now of late been thought by some people who "ought to know better; but," says he, "we must "always take care to distinguish between matters "of law and matters of fact, and they are not to be "confounded."—With such a train of authorities it is rather extraordinary to hear that matter *now* broached as a question which admits of doubt. And if they go farther back they will find it still clearer; for about the time of the Revolution authorities will be found which go directly to the point. In one of them, which arose within a year or two from the time of the case of the seven Bishops, which the Counsel alluded to, a Defendant in an information for a libel, which was tried at bar, said to the Court, "As the information states this to be a "scandalous and seditious libel, I desire it may be "left to the Jury to say whether it is a scandalous and "seditious libel or not." The answer then given by the Court was, "That is matter of law; the Jury

" are to decide upon the fact; and if they find you " guilty of the fact, the Court will afterwards con- " sider whether it is or not a libel."—If one goes still farther back, we find it settled as a principle which admits of no dispute, and laid down so early as the reign of Queen Elizabeth, as a maxim, that " *ad quæstionem facti respondent juratores, ad quæ-* " *stionem juris respondent judices.*" And in the case that the Counsel has thought fit to allude to under the name of Bushell's case, the same maxim is recognised by the Court negatively, *viz.* " *ad quæ-* " *stionem facti non respondent judices, ad quæstionem* " *legis non respondent juratores* ;" for, said the Court unanimously, if it be asked of the Jury what the law is, they cannot say ; if it be asked of the Court what the fact is, they cannot say.—Now so it stands as to legal history upon the business. Suppose there were no authority at all, can any thing be a stronger proof of the impropriety of what is contended for by the Counsel for the Defendant than what they have had recourse to ? You have been addressed not as is very usual to address a Jury, which you must know yourselves if you have often served upon them ;—you have been addressed upon a question of law, on which they have quoted cases for a century back. Now are you possessed of those cases in your own minds ? Are you apprized of the distinctions on which those determinations are founded ? Is it not a little extraordinary to require of a Jury that they should carry all the legal determina-

tions in their minds? If one looks a little farther into the constitution, it seems to me that without recourse to authorities it cannot admit of a doubt what is the mode of administering justice in this country.—The Judges are appointed to decide the law, the Juries to decide the fact—How?—both under the solemn obligation of an oath; the Judges are sworn to administer the law faithfully and truly; the Jury are not so sworn, but to give a true verdict according to the evidence. Did ever any man hear of it, or was it ever yet attempted to give evidence of what the law was?—If it were done in one instance it must hold in all. Suppose a Jury should say that which is stated upon a record is high treason or murder; if the facts charged upon the record are not so, it is the duty of the Court to look into the record, and they are bound by their oaths to discharge the Defendant: the consequence, if it were not so, would be, that a man would be liable to be hanged who had offended against no law at all. It is for the Court to say whether it is any offence or not, after the fact is found by the Jury. It would undoubtedly hold in civil cases as well as criminal, and as the Counsel for the prosecution has said in reply, by the same reason in the case of an ejectment, you might give a verdict against law. But was it ever supposed that a Jury was competent to say, what is the operation of a fine, or a recovery, or a warranty, which are mere questions of

law? Then the Counsel says, it is a very extraordinary thing if you have nothing else to decide but the fact of the publication; because then the Jury are to do nothing but to decide that which was never disputed. Now there is a great deal of art in that argument, and it was very ingeniously put by the Counsel; but all that arises from the want of distinguishing how the matter comes here, and how it stands now: it is not true that the Defendant by the issue admits that he ever published it. No, upon the record he denies it, but when he comes here he thinks fit to admit it: but that does not alter the mode of trial. Then it is asserted, that if you go upon the publication only, the Defendant would be found guilty, though he is innocent. But that is by no means the case; and it is only necessary to see how many guards the law has made, to show how fallacious the argument is. If the fact were, that the Defendant never denied the publication, but meant to admit it, and insist that it was not a libel, he had another way in which he should have done it, a way universally known to the profession; he ought to have demurred to the indictment, by which in substance he would have said—I admit the fact of publishing it, but deny that it is any offence. But he is not precluded even now from saying it is not a libel; for if the fact be found by you, that he did publish the pamphlet, and upon future consideration the Court of King's Bench shall be of opinion that

it is not a libel, he must then be acquitted *. As to his coming here, it is his own choice.

But, say the Counsel farther, it is clear in point of law, that in a criminal case the Defendant cannot plead specially, therefore he might give any thing in evidence that would be a justification if he could plead specially. I admit it; but what does that amount to? You must plead matter of fact; you cannot plead matter of law, the plea is bad if you do: then admitting that he could give that in evidence upon Not guilty, which would in point of law, if pleaded, amount to an excuse or a defence; the question still is, what are the facts on which the defence is founded? That brings the case to the question of publication, for the innuendos are no more than this: the indictment says, that by the letter G. is meant Gentleman, and by the letter F. is meant Farmer. Now the title of this pamphlet is, "The "Principles of Government, in a Dialogue between a "*Gentleman* and a *Farmer*." The first question is, whether the *G.* means *Gentleman*, and the *F. Farmer:* the next question is not upon initials or letters that may be doubtful, but whether *the King*, written at length, means *the King of Great Britain*, and whether *the Parliament* means *the Parliament of Great Britain:* these are points I don't know how to state a question upon; and if you are satisfied as to the

* It must be obvious to every body, that upon this doctrine the press was in the hands of Judges appointed by the Crown.

innuendos, the only remaining question of fact is as to the publication. Whether Mr. Edward Jones's evidence will or will not operate in mitigation of punishment, is not a question for me to give an opinion upon, because it is not for me to inflict the punishment, *if the Defendant is found guilty*. But upon his evidence it stands thus; the Dean had thoughts of printing the pamphlet in Welsh, but upon what was said to him by Mr. Jones, and other gentlemen, his friends, he declined it, but he afterwards published it in English; for this conversation is sworn by Jones to be on the 7th of January, and not till the 24th of January does he send this letter to Edwards with the pamphlet, desiring that it might be published; therefore there is no contradiction as to the publication: and if you are satisfied of this in point of fact, it is my duty to tell you in point of law you are bound to find the Defendant guilty. I wish to be as explicit as I can in the directions I give, because, if I err in any respect, it is open to the Defendant to have it corrected. As far as it is necessary to give any opinion in point of law upon the subject of the trial, I readily do it; beyond that I don't mean to say a word, because it is not necessary nor proper here. In a future stage of the business, if the Defendant is found guilty, he will have a right to demand my opinion; and if ever that happens, it is my duty to give it, and then I will; but till that happens I do not think it proper, or by any means incumbent upon one who sits where I do, to go out of the case to

give an opinion upon a subject, which the present stage of the case does not require; therefore I can only say, that if you are satisfied that the Defendant did publish this pamphlet, and are satisfied as to the truth of the innuendos, in point of law you ought to find him guilty; if you think they are not true, you will of course acquit him.

The Jury withdrew to consider of their verdict, and in about half an hour returned again into Court.

Associate. Gentlemen, do you find the Defendant guilty or not guilty?

Foreman. Guilty of publishing only.

Mr. Erskine. You find him guilty of publishing only?

A Juror. Guilty only of publishing.

Mr. Justice Buller. I believe that is a verdict not quite correct—You must explain that one way or the other as to the meaning of the innuendos. The indictment has stated that G. means Gentleman, F. Farmer; the King the King of Great Britain, and the Parliament the Parliament of Great Britain.

One of the Jury. We have no doubt of that.

Mr. Justice Buller. If you find him guilty of publishing, you must not say the word *only*.

Mr. Erskine. By that they mean to find there was no sedition.

A Juror. We only find him guilty of publishing. We do not find any thing else.

Mr. Erskine. I beg your Lordship's pardon with great submission. I am sure I mean nothing that is

irregular. I understand they say, We only find him guilty of publishing.

A Juror. Certainly, that is all we do find.

Mr. Broderick. They have not found that it is a libel of and concerning the King and his Government.

Mr. Justice Buller. If you only attend to what is said, there is no question or doubt. If you are satisfied whether the letter G. means Gentleman, whether F. means Farmer, the King means King of Great Britain, the Parliament the Parliament of Great Britain—if they are all satisfied it is so,—is there any other innuendo in the indictment?

Mr. Leycester. Yes, there is one more upon the word *votes*.

Mr. Erskine. When the Jury came into Court, they gave, in the hearing of every man present, the very verdict that was given in the case of the King against Woodfall; they said, Guilty of publishing only. Gentlemen, I desire to know whether you mean the word *only* to stand in your verdict?

One of the Jury. Certainly.

Another Juror. Certainly.

Mr. Justice Buller. Gentlemen, if you add the word *only*, it will be negativing the innuendos; it will be negativing, that by the word King it means King of Great Britain; by the word Parliament, Parliament of Great Britain; by the letter F. it means Farmer, and G. Gentleman; that I understand you do not mean.

A Juror. No.

Mr. Erskine. My Lord, I say that will have the effect of a general verdict of Guilty. I desire the verdict may be recorded. I desire your Lordship sitting here as Judge to record the verdict as given by the Jury. If the Jury depart from the word *only*, they alter their verdict.

Mr. Justice Buller. I will take the verdict as they mean to give it; it shall not be altered. Gentlemen, if I understand you right, your verdict is this, you mean to say guilty of publishing this libel?

A Juror. No; the pamphlet; we do not decide upon its being a libel.

Mr. Justice Buller. You say he is guilty of publishing the pamphlet, and that the meaning of the innuendos is as stated in the indictment.

A Juror. Certainly.

Mr. Erskine. Is the word *only* to stand part of your verdict?

A Juror. Certainly.

Mr. Erskine. Then I insist it shall be recorded.

Mr. Justice Buller. Then the verdict must be misunderstood; let me understand the Jury.

Mr. Erskine. The Jury do understand their verdict.

Mr. Justice Buller. Sir, I will not be interrupted.

Mr. Erskine. I stand here as an advocate for a brother citizen, and I desire that the word *only* may be recorded.

Mr. Justice Buller. Sit down, Sir; remember your

duty, or I shall be obliged to proceed in another manner.

Mr. Erskine. Your Lordship may proceed in what manner you think fit; I know my duty as well as your Lordship knows yours. I shall not alter my conduct.

Mr. Justice Buller. Gentlemen, if you say guilty of publishing only, you negative the meaning of the particular words I have mentioned.

A Juror. Then we beg to go out.

Mr. Justice Buller. If you say guilty of publishing only, the consequence is this, that you negative the meaning of the different words I mentioned to you—That is the operation of the word *only*—They are endeavouring to make you give a verdict in words different from what you mean.

A Juror. We should be very glad to be informed how it will operate?

Mr. Justice Buller. If you say nothing more but find him guilty of publishing, and leave out the word *only*, the question of law is open upon the record, and they may apply to the Court of King's Bench, and move in arrest of judgment there. If they are not satisfied with the opinion of that Court, either party has a right to go to the House of Lords, if you find nothing more than the simple fact; but if you add the word *only*, you do not find all the facts; you do not find in fact that the letter G. means Gentleman; that F. means Farmer; the King, the King

of Great Britain; and Parliament, the Parliament of Great Britain.

A Juror. We admit that.

Mr. Justice Buller. Then you must leave out the word *only*.

Mr. Erskine. I beg pardon. I beg to ask your Lordship this question, Whether, if the Jury find him guilty of publishing, leaving out the word *only*, and if the judgment is not arrested by the Court of King's Bench, whether the sedition does not stand recorded?

Mr. Justice Buller. No, it does not, unless the pamphlet be a libel in point of law.

Mr. Erskine. True; but can I say that the Defendant did not publish it seditiously, if judgment is not arrested, but entered in the record?

Mr. Justice Buller. I say it will not stand as proving the sedition. Gentlemen, I tell it you as law, and this is my particular satisfaction, as I told you when summing up the case; if in what I now say to you I am wrong in any instance, they have a right to move for a new trial. The law is this: if you find him guilty of publishing, without saying more, the question whether libel or not is open for the consideration of the Court.

A Juror. That is what we mean.

Mr. Justice Buller. If you say, Guilty of publishing only, it is an incomplete verdict, because of the word *only*.

A Juror. We certainly mean to leave the matter of libel to the Court.

Mr. Erskine. Do you find sedition?

A Juror. No; not so. We do not give any verdict upon it.

Mr. Justice Buller. I speak from adjudged cases (I will take the verdict when you understand it yourselves in the words you give it): if you say, Guilty of publishing only, there must be another trial.

A Juror. We did not say so; only guilty of publishing.

Mr. Erskine. Will your Lordship allow it to be recorded thus, only guilty of publishing?

Mr. Justice Buller. It is misunderstood.

Mr. Erskine. The Jury say, only guilty of publishing. Once more, I desire that that verdict may be recorded.

Mr. Justice Buller. If you say, only guilty of publishing, then it is contrary to the innuendos; if you think the word King means the King of Great Britain; the word Parliament, the Parliament of Great Britain; the G. means Gentleman; and the F. Farmer; *you may say this*, guilty of publishing; but whether a libel or not, the Jury do not find.

A Juror. Yes.

Mr. Erskine. I asked this question of your Lordship in the hearing of the Jury, whether, upon the verdict you desire them to find, the sedition which they have not found, will not be inferred by the Court if judgment is not arrested?

Mr. Justice Buller. Will you attend? Do you give it in this way, Guilty of the publication, but whether a libel or not, you do not find?

A Juror. We do not find it a libel, my Lord; we do not decide upon it.

Mr. Erskine. They find it no libel.

Mr. Justice Buller. You see what is attempted to be done?

Mr. Erskine. There is nothing wrong attempted upon my part. I ask this once again in the hearing of the Jury; and I desire an answer from your Lordship as Judge, whether or no, when I come to move in arrest of judgment, and the Court enter up judgment, and say it is a libel, whether I can afterwards say, in mitigation of punishment, the Defendant was not guilty of publishing it with a seditious intent, when he is found guilty of publishing it in manner and form as stated; and whether the Jury are not thus made to find him guilty of sedition, when in the same moment they say they did not mean to do so. Gentlemen, do you find him guilty of sedition?

A Juror. We do not, neither one or the other.

Mr. Justice Buller. Take the verdict.

Associate. You say, guilty of publishing; but whether a libel or not you do not find?

A Juror. That is not the verdict.

Mr. Justice Buller. You say, guilty of publishing, but whether a libel or not you do not find; is that your meaning?

A Juror. That is our meaning.

One of the Counsel. Do you leave the intention to the Court?

A Juror. Certainly.

Mr. Cowper. The intention arises out of the record.

Mr. Justice Buller. And unless it is clear upon record there can be no judgment upon it.

Mr. Bearcroft. You mean to leave the law where it is?

A Juror. Certainly.

Mr. Justice Buller. The first verdict was as clear as could be, they only wanted it to be confounded.

ON the 8th of November, the second day of the ensuing term, Mr. Erskine moved the Court of King's Bench to set aside the verdict, for the misdirection of the Judge in the foregoing Charge to the Jury, and obtained a rule to show cause, why there should not be a new trial. There was no short-hand writer in Court except a gentleman employed by the Editors of the Morning Herald, from which paper of the succeeding day the following Speech of Mr. Erskine was taken.

Mr. Erskine's Speech, *delivered in the Court of King's Bench, on Monday the 8th of November* 1784, *on his Motion for a new Trial in Defence of the* Dean *of* St. Asaph.

Mr. Erskine began by stating to the Court the substance of the indictment against the Dean of St. Asaph, which charged the publication with an intention to incite the people to subvert the government by armed rebellion ;—the mere evidence of the publication of the Dialogue which the Prosecutor had relied on to establish that malicious intention,—and the manner in which the Defendant had, by evidence of his real motives for publishing it, as contained in the advertisement, rebutted the truth of the epithets charged by the indictment.

He then stated the substance of his speech to the Jury at Shrewsbury, maintaining the legality of the Dialogue, the right of the Jury to consider that legality, the injustice of a verdict affixing the epithet of *guilty* to a publication, without first considering whether the thing published contained any *guilt*; and, above all, the right which the Jury unquestionably had (even upon the authority of those very cases urged against his client) to take the evidence into consideration, by which the Defendant sought to excul-

pate himself from the seditious intention charged by the indictment.

He said that the substance of Mr. Jones's evidence was, *that it had been the intention of the Flintshire Committee to translate the Dialogue into Welsh*; that it was delivered to him to give to a Mr. Lloyd for that purpose; that *the Dean had just then received it from Sir William Jones*, and had not had time to read it, before he delivered it to the witness. Some days after, Mr. Jones wrote to the Dean, telling him, that he had collected the opinions of some gentlemen that the translation of it into Welsh might do harm; the Dean's answer (WHO HAD NEVER THEN READ THE THING HIMSELF) was this, "I am very much "obliged to you for what you have communicated "respecting the pamphlet; I should be exceeding "sorry to publish any thing that should tend to se-"dition." Mr. Erskine contended that this was no admission on the Dean's part that he thought it seditious, for he had never read it; but that his conduct showed that he was not seditiously inclined, since he stopped the publication even in compliance with the affected scruples of men whom he found out, on reading it, to be both wicked and ignorant; and the translation of it into Welsh was accordingly dropped.

Mr. Jones had further said, that many persons afterwards, and particularly Mr. Fitzmaurice, made very free with the Dean's character, for having entertained an idea of translating it into Welsh; it

was publicly mentioned at the general meeting of the county, and many opprobrious epithets being fastened on the Dialogue itself, the Dean said, "*I am now "called upon to show that it is not seditious, and I "read it with a rope about my neck.*"

MR. ERSKINE THEN SPOKE AS FOLLOWS VERBATIM.

My Lord, although this is not the place for any commentary on the evidence, I cannot help remarking, that this expression was strong proof that the Dean did not think it seditious; for it is absurd to suppose that a man, feeling hurt at the accusation of sedition, should say, I am now called upon to show I am not seditious, and then proceed to read that aloud, which he *felt and believed* to contain sedition. The words which follow, "I read it with a rope "about my neck," confirm this construction. The obvious sense of which is—I am now called upon to show that this Dialogue is not seditious;—it has never been read by those who call it so;—I will read it in its own vindication, and in mine—"*I read it with a rope about my neck,*" that is—if it be treasonable, as is asserted, it is a misdemeanor to read it; but I am so convinced of its innocence, that I read it notwithstanding—*meo periculo.*

The only part of Mr. Jones's evidence which remains, is as follows: I asked him, "Did you col- "lect, from what the Dean said, that his opinion "was, that the Dialogue was constitutional and "legal?" His answer was: "UNDOUBTEDLY. The

" Dean said, Now, I have read this, I do not think " it so bad a thing; and I think we ought to pub- " lish it, in *vindication of the committee*." The question and answer must be taken in fairness together:—the witness was asked if he collected from the Dean, that he thought it innocent and constitutional, and the first term in the answer is decisive; that the witness did not merely think it LESS criminal than it had been supposed, but *perfectly constitutional*; for he says, " *Undoubtedly I collected that he thought so.*" The Dean said, he thought he ought to publish it in vindication of the committee; and it is repugnant to common sense, to believe that if the Dean had supposed the Dialogue *in any degree* criminal, he would have proposed to publish it himself, in vindication of a former intention of publication by the committee.—It would have been a confirmation, not a refutation of the charge.

The learned Judge, after reciting the evidence, which I have just been stating (merely as a matter of form, since afterwards it was laid wholly out of the question), began by telling the Jury, that he was astonished at a great deal he had heard from the Defendant's Counsel; for that he did not know any one question of law more thoroughly settled than the doctrine of libels, as he proposed to state it to them:—it then became *my turn* to be astonished. Mr. Justice Buller then proceeded to state, that what had fallen from me, namely, that the Jury had a right to consider the libel, *was only the language of a party*

in this country; *but that the contrary of their notions was so well established, that no man who meant well, could doubt concerning it.*

It appeared afterwards that Mr. Lee and myself were members of this party; though my friend was charged with having deserted his colours; as he was the first authority that was cited against me; and what rendered the authority more curious, the learned Judge mentioned, that he had delivered his dictum at Guildhall as counsel for a Plaintiff, when these doctrines might have been convenient for the interests of his Client, and therefore no evidence of his opinion. This quotation, however, had perhaps more weight with the Jury than all that followed, and certainly the novelty of it entitled it to attention.

I hope, however, the sentiments imputed to my friend were not necessary upon that occasion; if they were, his Client was betrayed: for I was myself in the cause alluded to; and I take upon me to affirm, that Mr. Lee *did not, directly or indirectly*, utter any sentiment in the most remote degree resembling that which the learned Judge was pleased to impute to him for the support of his charge. This I shall continue to affirm notwithstanding the Judge's declaration to the contrary, until I am contradicted by Mr. Lee himself, who is here to answer me if I misrepresent him. [Mr. Lee confirmed Mr. Erskine by remaining silent.]

The learned Judge then said, that as to whether the Dialogue, which was the subject of the prosecution, was criminal or innocent, he should not even

hint an opinion; *for that if he should declare it to be no libel, and the Jury, adopting that opinion, should acquit the Defendant, he should thereby deprive the Prosecutor of his right of appeal upon the record; which was one of the dearest birthrights of the subject.*—That the law was equal as between the Prosecutor and Defendant; and that there was no difference between criminal and civil cases.—I am desirous not to interrupt the state of the trial by observations; but cannot help remarking, that justice to the Prosecutor as standing exactly in equal scales with a prisoner, and in the light of an adverse party in a civil suit, was the first reason given by the learned Judge, why the Jury should at all events find the Defendant guilty, without investigating his guilt. This was telling the Jury in the plainest terms, *that they could not find a general verdict in favour of the Defendant, without an act of injustice to the Prosecutor*; who would be shut out by it from his writ of error, which he was entitled to by law, and which was the best birthright of the subject. It was, therefore, an absolute denial of the right of the Jury, and of the Judge also, as no right can exist, which necessarily works a wrong in the exercise of it. If the Prosecutor had by law a right to have the question on the record, the Judge and Jury were both tied up at the trial; the one from directing, and the other from finding a verdict which disappointed that right.

If the Prosecutor had a right to have the question

upon the record, for the purpose of appeal, by the Jury's confining themselves to the fact of publication, which would leave that question open, it is impossible to say, that the Jury had a right likewise to judge of the question of libel, and to acquit the Defendant, which would deprive the Prosecutor of that right. There cannot be contradictory rights, the exercise of one destroying and annihilating the other. I shall discuss this new claim of the Prosecutor upon a future occasion; for the present, I will venture to say, that no man has a right,—a property,—or a beneficial interest in the punishment of another. A prosecution at the instance of the Crown has public justice alone, and not private vengeance, for its object:—in prosecutions for murder, and felonies and most other misdemeanors, the Prosecutor can have no such pretence, since the record does not comprehend the offence.—Why he should have it in the case of a libel, I would gladly be informed.

The learned Judge then stated your Lordship's uniform practice, in trying libels, for eight and twenty years,—the acquiescence of parties and their Counsel, and the ratification of the principle, by a judgment of the Court, in the case of the King against Woodfall. He likewise cited a case, which he said, happened within a year or two of the time of the seven Bishops, in which a Defendant, indicted for a seditious libel, desired it might be left to the Jury, whether the paper was seditious; but that the Court said, the Jury were to decide upon *the*

fact; and that if they found him guilty of the *fact*, the Court would afterwards decide the question of libel. The learned Judge then cited the maxim, *ad quæstionem facti respondent juratores, ad quæstionem juris respondent judices*, and said, that maxim had been confirmed in the sense he put on it in the very case of Bushel, on which I had relied so much for the contrary position.

The learned Judge, after honouring some of my arguments with answers, and saying again, in stronger terms than before, that there was no difference between the province of the Jury in civil and criminal cases, notwithstanding the universality of the general issue instead of special pleadings, told the Jury, *that if they believed that G. meant Gentleman, and F. meant Farmer, the matter for their consideration was reduced to the simple fact of publication.*

The Court will please to recollect, that the advertisements, explaining the Dean's sentiments concerning the pamphlet, and his motives for the publication of it in English, after it had been given up in Welsh, had been read in evidence to the Jury: —that Mr. Jones had been likewise examined to the same effect, to induce the Jury to believe the advertisement to have been prefixed to it *bona fide*, and to have spoken the genuine sentiments and motives of the publisher:—and that several gentlemen, of the first character in the Dean's neighbour-

hood, in Wales, had been called to speak to his general peaceable deportment, in order to strengthen that proof, and to resist the assent of the Jury to the principal averment in the information, viz. *That the Defendant published, intending to excite a revolution in the Government, by armed rebellion.* Whether all this evidence, given for the Defendant, was adequate to its purpose, is foreign to the present inquiry.—I think it was.—*But my objection is, that no part of it was left to the consideration of the Jury, who were the judges of it.* As to the advertisement, which was part of the pamphlet itself, the learned Judge never even named it, but as part of the Prosecutor's proof of the publication, though I had read it to the Jury, and insisted upon it as sufficient proof of the Defendant's intention, and had called Mr. Jones to confirm the construction I put upon it.

As to Mr. Jones's testimony, Mr. Justice Buller said, "Whether his evidence will or will not ope-"rate in mitigation of punishment, is not a question "for me to give an opinion upon." And he further declared, that if the Jury were satisfied as to the fact of the publication, they were BOUND to find the Defendant guilty. As to the evidence of character, it was disposed of in the same manner. Mr. Justice Buller said, "As to the several witnesses who have "been called to give Mr. Shipley the character of a "quiet and peaceable man, not disposed to stir up se-"dition, *that cannot govern the present question*; *for*

" *the question you are to decide on is, Whether he* " *be, or be not, guilty of publishing this pamphlet.*"

This Charge, therefore, contained an express exclusion of the right of the Jury to consider the evidence offered by the Defendant, to rebut the inference of sedition arising from the act of publication.

The learned Judge repeated the same doctrine at the end of his Charge; entirely removing from the Jury the consideration of the whole of the Defendant's evidence, and concluded by telling them, " *That if they were satisfied as to the truth of the* " *innuendos and the fact of publication, they were* " BOUND *to find the Defendant guilty.*" The Jury retired to consider of this Charge, and brought in a verdict, " Guilty of publishing ONLY." The learned Judge refused to record it, and I am ready to admit that it was an imperfect verdict. He was not bound to receive it; but when he saw the Jury had no doubt of the truth of the innuendos, and that therefore the word ONLY could not apply to a negation of them; he should have asked them whether they believed the Defendant's witnesses, and meant to negative the seditious purpose? It was the more his duty to have asked that question, as several of the Jury themselves said that they gave no opinion concerning seditious intention: a declaration decisive in the Defendant's favour, who had gone into evidence to rebut the charge of intention, and of which the Judge, who, in the humane theory

of the English law, ought to be counsel for the prisoner, should at the least have taken care to obtain an explanation from the Jury, by asking them what *their* opinion was, instead of arguing upon the principle of *his own* Charge, what it necessarily must be, if the innuendos were believed; a position which gave the go-bye to the difficulties of the Jury. Their intention to exclude the seditious purpose was palpable; and under such circumstances, the excellent remark of the great Mr. Justice Foster never should be forgotten: "When the rigour of the law "bordereth upon injustice, mercy ought to interpose "in the administration. It is not the part of Judges "to be perpetually hunting after forfeitures, while "the heart is free from guilt. They are the ministers of the Crown, appointed for the ends of "public justice, and ought to have written upon "their hearts the obligation which His Majesty is "under, to cause law and justice in mercy to be executed in all his judgments." This solemn obligation is no doubt written upon the hearts of all the Judges; but it is unfortunate when it happens to be written in so illegible a hand that a Jury cannot possibly read it.

To every part of the learned Judge's directions, I have objections which appear to me to be weighty. I will state them distinctly, and in their order, as shortly, or as much at large, as the Court shall require of me.

The first proposition which I mean to maintain as a foundation for a new trial, is this:

That when a bill of indictment is found, or an information filed, charging any crime or misdemeanor known to the law of England, and the party accused, puts himself upon the country by pleading the general issue, Not Guilty:—the Jury are GENERALLY charged with his deliverance from that CRIME, and not SPECIALLY from the fact or facts, in the commission of which the indictment or information charges the crime to consist; much less from any single fact to the exclusion of others charged upon the same record.

Secondly, I mean to maintain, that no act which the law in its general theory holds to be criminal, constitutes in itself a crime abstracted from the mischievous intention of the actor; and that the intention, even where it becomes a simple inference of reason from a fact or facts established, may, and ought to be, collected by the Jury with the Judge's assistance; because the act charged, though established as a fact in a trial on the general issue, does not necessarily and unavoidably establish the criminal intention by any ABSTRACT conclusion of law; the establishment of the fact being still no more than *evidence* of the crime, but not the CRIME ITSELF, unless the Jury render it so themselves by referring it voluntarily to the Court by special verdict.

I wish to explain this proposition.

When a Jury can discover no other reasonable

foundation for judging of the intention, than the inference from the act charged, and doubting what that inference ought to be in law, refer it to the Court by special verdict, the intention becomes by that inference a question of law; but it only becomes so by this voluntary declaration of the Jury, that they mean the party accused shall stand or fall by the abstract legal conclusion from the act charged, not being able to decypher his purpose by any other medium.

But this discretionary reference to the Court upon particular occasions, which may render it wise and expedient, does not abridge or contract the power or the duty of a Jury, under other circumstances, to withhold their consent from the intention being taken as a legal consequence of the act; even when they have had no evidence capable of being stated on the face of a special verdict, they may still find a general verdict, founded on their judgment of the crime, and the intention of the party accused of it.

When I say, that the Jury MAY consider the crime, and the intention, I desire to be understood to mean, not merely that they have the POWER to do it without control or punishment, and without the possibility of their acquittal being disannulled by any other authority (for that no man can deny); but I mean, that they have a constitutional legal RIGHT to do so; a right, in many cases, proper to be exercised, and intended by the wise founders of the English Government to be a protection to the lives

and liberties of Englishmen, against the encroachments and perversions of authority in the hands of fixed magistrates.

The establishment of both, or either of these two propositions, must entitle me to a new trial; for if the Jury, on the general issue, had a strictly legal jurisdiction to judge of the libellous nature, or seditious tendency of the paper (taking that nature or tendency to be law or fact), then the Judge's direction is evidently unwarrantable. If he had said, As libel or no libel requires a legal apprehension of the subject, it is my duty to give you my opinion; and had then said, I think it is a libel, and had left the Jury to find it one under his directions, or otherwise, at their discretion, and had at the same time told them that the criminal intention was an inference from the publication of a libel, which it was their duty to make,—or if, admitting their right in *general*, he had advised a special verdict in the *particular instance*, I should have stood in a very different situation; but he told the Jury (I take the general result of his whole Charge), that they had no jurisdiction to consider of the libel, or of the intention, both being beyond the compass of their oath.

Mr. Bearcroft's position was very different: he addressed the Jury with the honest candour of a Judge, without departing from the proper zeal of an Advocate. He said to the Jury—I cannot honour him more than by repeating his words; they will

long be remembered by those who respect *him*, and love the constitution :—

"There is no law in this country," said Mr. Bearcroft, ("thank God, there is not; for it would "not be a free constitution if there were,) that pre- "vents a Jury, if they choose it, from finding a "general verdict; I admit it; I rejoice in it; I ad- "mire and reverence the principle, as the palladium "of the constitution. But does it follow, because "a Jury *may* do this, that they *must* do it—that they "OUGHT to do it?" He then took notice of the case of the seven Bishops, and honoured the Jury for exercising this right on that occasion.

Mr. Bearcroft's position is therefore manly and intelligible; it is simply this: It is the excellence of the English constitution that you may exert this power when you think the season warrants the exercise of it. The case of the seven Bishops was such a season, this is not.

But Mr. Justice Buller did by no means ratify this doctrine. It is surely not too much to expect that the Judge, who is supposed to be counsel for the prisoner, should keep within the bounds of the counsel for the Crown, when a Crown prosecution is in such hands as Mr. Bearcroft's.—The learned Judge, however, told the Jury from his own authority, and supported it with much history and observation, and many quotations, that they had nothing to do at all with those questions, their jurisdiction over which Mr. Bearcroft had rejoiced in as the pal-

ladium of the constitution. He did not tell them this by way of advice, as applied to the particular case before them;—he did not (admitting their right), advise them to forbear the exercise of it in the *particular instance*:—no! the learned Judge fastened an UNIVERSAL ABSTRACT limitation on the province of the Jury to judge of the crime, or the criminal purpose of the Defendant. His whole speech laid down this limitation UNIVERSALLY, and was so understood by the Jury; he told them these questions were beyond the compass of their oaths, which was confined to the decision of the fact; and he drove them from the law by the terrors of conscience.—The conclusion is short.

If the Jury have no jurisdiction by the law of England, to examine the question of libel, and the criminality or innocence of the intention of the publisher, then the Judge's Charge was right: but if they have jurisdiction, and if their having it be the palladium of the Government, it must be wrong. For how, in common sense, can that power in a Jury be called the palladium of the constitution, which can never be exerted, but by a breach of those rules of law, which the same constitution has established for their government?

If in no case a Jury can entertain such a question without stepping beyond their duty, it is an affront to human reason to say, that the safety of the Government depends on men's violating their oaths in the administration of justice. If the Jury have

that right, there is no difference between restricting the exercise of it by the terrors of imprisonment, or the terrors of conscience. If there be any difference, the second is the most dangerous; an upright Juryman, like Bushel, would despise the first, but his very honesty would render him the dupe of the last.

The two former propositions on which my motion is founded, applying to all criminal cases;—and a distinction having always been taken between libels and other crimes by those who support the doctrines I am combating;—I mean therefore to maintain, that an indictment for a libel, even where the slander of an individual is the object of it (which is capable of being measured by precedents of justice), forms no exception to the jurisdiction or duties of Juries, or the practice of Judges in other criminal cases:—that the argument for the difference, viz. because the whole crime always appears upon the record, is false in fact, and, even if true, would form no solid or substantial difference in law.

I said, that the record does not always contain sufficient for the Court to judge of a libel. The Crown may indict part of a publication, and omit the rest, which would have explained the author's meaning, and rendered it harmless: it has done so here; the advertisement is part of the publication, but no part of the record.

The famous case put by Algernon Sidney, is the best illustration that can possibly be put.

Suppose a bookseller having published the Bible, was indicted in these words, "That intending to promote atheism and irreligion, he had blasphemously "printed and published the following false and profane libel,—There is no God." — The learned Judge said, that a person unjustly accused of publishing a libel might always demur to the indictment: this is an instance to the contrary; on the face of such a record, by which the demurrer can alone be determined, it contains a complete criminal charge. The Defendant therefore would plead Not guilty, and go down to trial, when the Prosecutor of course could only produce the Bible to support the charge, by which it would appear to be only a verse in the Proverbs of Solomon, viz. "The fool has said in "his heart, There is no God," and that the context had been omitted to constitute the libel. The Jury, shocked at the imposition, would only wait the Judge's direction to acquit; but consistently with the principles which have governed in the Dean of St. Asaph's trial, how could he be acquitted?—The Judge must say, You have nothing to do but with the fact, that the Defendant published *the words laid in the information.*

But, says the adversary, the distinction is obvious; reading the sacred context to the Jury would enable them to negative the innuendos which are within their province to reject, and which being rejected, would destroy the charge. The answer is obvious: such an indictment would contain no

innuendo on which a negative could be put: for if the record charged that the Defendant blasphemously published that there was no God, it would require no innuendo to explain it.

Driven from that argument, the adversary must say, that the Jury by the context would be enabled to negative the epithets contained in the introduction, and could never pronounce it to be blasphemous. But the answer to that is equally conclusive; for it was said, in the case of the King against Woodfall, that these epithets were mere formal inferences of law, from the fact of publishing that which on the record was a libel.

When the Defendant was convicted, it could not appear to the Court, that the Defendant only published the Bible. The Court could not look off the record, which says, that the Defendant blasphemously published that there was no God. The Judge, maintaining these doctrines, would not, however, forget the respect due to the *religion* of his country, though the law of it had escaped him. He would tell the Jury, that it should be remembered in mitigation of punishment; and the honest bookseller of Paternoster Row, when he came up in custody to receive judgment, would be let off for a small fine, upon the Judge's report, that he had only published a new copy of the Bible; but not till he had been a month in the King's Bench prison, while this knotty point of divinity was in discussion. This case has stood invulnerable for above one hun-

dred years, and it remains still for Mr. Bearcroft to answer.

I said, in opening this proposition, that even if it were true that the record did contain the whole charge, it would form no substantial difference in law; and I said so, because, if the position be, that the Court is always to judge of the law, when it can be made to see it upon the record, no case can occur, in which there could be a general verdict, since the law might be always separated from the facts by finding the latter specially, and referring them to the judgment of the Court. By this mode of proceeding, the crime would be equally patent upon the record as by indictment; and if it be patent there, it matters not whether it appears on the front or the back of the parchment; on the first by the indictment, or on the last by the postea.

People who seek to maintain this doctrine, do not surely see to what length it would go; for if it can be maintained that wherever, as in the case of a libel, the crime appears upon the record, the Court alone, and not the Jury, ought to judge; it must follow, that where a writing is laid as an overt act of high treason (which it may be when coupled with publication), the Jury might be tied down to find the fact, and the Judges of the Crown might make State criminals at their discretion, by finding the law.

The answer in these mild and independent days of judicature is this, (Mr. Bearcroft indeed gave it at the trial): Why may not Judges be trusted with

our liberties and lives, who determine upon our property and every thing that is dear to us?

The observation was plausible for the moment, and suited to his situation, but he is too wise a man to subscribe to it. Where is the analogy between ordinary civil trials between man and man, where Judges can rarely have an interest, and great State prosecutions, where power and freedom are weighing against each other, the balance being suspended by the servants of the executive Magistrate? If any man can be so lost to reason as to be a sceptic on such a subject, I can furnish him with a cure from an instance directly in point: let him turn to the 199th page of the celebrated Foster, to the melancholy account of Peachum's indictment for treason, for a manuscript sermon found in his closet, never published, reflecting on King James the First's government. The case was too weak to trust without management, even by the Sovereign to the Judges of those days; it was necessary first to sound them; and the great (but on that occasion the contemptible) Lord Bacon was fixed on for the instrument; and his letter to the King remains recorded in history, where, after telling him his successful practice on the puisne Judges, he says, that when in some dark manner he has hinted this success to Lord Coke, he will not choose to remain singular.

When it is remembered what comprehensive talents and splendid qualifications Lord Bacon was

gifted with, it is no indecency to say, that all Judges ought to dread a trust which the constitution never gave them, and which human nature has not always enabled the greatest men to fulfil.

If the Court shall grant me a rule, I mean to contend, 4thly, that a seditious libel contains no question of law; but supposing the Court should deny the legality of all these propositions, or, admitting their legality, resist the conclusion I have drawn from them, then the last proposition in which I am supported, even by all those authorities on which the learned Judge relies for the doctrines contained in this charge is this:

PROPOSITION V.

That in all cases where the mischievous intention (which is agreed to be the essence of the crime) cannot be collected by simple inference from the fact charged, because the Defendant goes into evidence to rebut such inference, the intention becomes then a pure unmixed question of fact, for the consideration of the Jury.

I said the authorities of the King against Woodfall and Almon were with me. In the case of Rex against Woodfall, 5th Burrow, Lord Mansfield expressed himself thus: "Where an act in itself indifferent, "becomes criminal, when done with a particular "intent, there the intent must be proved and found. "But where the act is itself unlawful, as in the case "of a libel, the PROOF of justification or excuse lies "on the Defendant; *and in failure thereof, the law*

" *implies a criminal intent.*"—Most luminously expressed to convey this sentiment, viz. That when a man publishes a libel, and has nothing to say for himself,—no explanation or exculpation,—a criminal intention need not be proved: it is an inference of common sense, not of law. But the publication of a libel does not exclusively show criminal intent, but is only an implication of law, in failure of the Defendant's proof. Lord Mansfield immediately afterwards in the same case explains this further: " There " may be cases where the publication may be justi- " fied or excused as lawful OR INNOCENT; FOR NO " ACT WHICH IS NOT CRIMINAL, *though the paper* " BE A LIBEL, can amount to SUCH a publication of " which a Defendant ought to be found guilty." But no question of that kind arose at the trial (i. e. trial of Woodfall). Why?—Lord Mansfield immediately says why, " *Because* the Defendant called " no witnesses;" expressly saying, that the publication of a libel is not in itself a crime, unless the intent be criminal; and that it is not merely in mitigation of punishment, but that *such* a publication does not warrant a verdict of Guilty, if the seditious intention be rebutted by evidence.

In the case of the King against Almon, a Magazine containing one of Junius's letters, was sold at Almon's shop; there was proof of that sale at the trial. Mr. Almon called no witnesses, and was found guilty. To found a motion for a new trial, an affidavit was offered from Mr. Almon, that he was not privy

to the sale, nor knew that his name was inserted as a publisher, and that this practice of booksellers being inserted as publishers by their correspondents without notice, was common in the trade.

Lord Mansfield said, "Sale of a book in a bookseller's shop, is *primâ facie* evidence of publication "by the master, and the publication of a libel is "*primâ facie* evidence of criminal intent: it stands "good till answered by the Defendant: it must "stand till contradicted or explained; *and if not* "*contradicted, explained, or exculpated,* BECOMES "*tantamount to conclusive when the Defendant calls* "*no witnesses.*"

Mr. Justice Aston said, "*Primâ facie* evidence "not answered is sufficient to ground a verdict "upon; if the Defendant had a sufficient excuse, "he might have proved it at the trial: his having "neglected it where there was no surprise, is no "ground for a new one." Mr. Justice Willes and Mr. Justice Ashhurst agreed upon those express principles.

These cases declare the law beyond all controversy to be, that publication, even of a libel, is no *conclusive* proof of guilt, but only *primâ facie* evidence of it till answered; and that if the Defendant can show that his intention was not criminal, he completely rebuts the inference arising from the publication, because, though it remains true that he published, yet it is, according to Lord Mansfield's express words, not such a publication of which a De-

fendant ought to be *found guilty*. Apply Mr. Justice Buller's summing up to this law, and it does not require even a legal apprehension to distinguish the repugnancy.

The advertisement was proved to convince the Jury of the Dean's motive for publishing; Mr. Jones's testimony went strongly to aid it; and the evidence to character, though not sufficient in itself, was admissible to be thrown into the scale. But not only no part of this was left to the Jury, *but the whole of it was expressly removed from their consideration*; although in the cases of Woodfall and Almon, it was as expressly laid down to be within their cognizance; and a complete answer to the charge, if satisfactory to the minds of the Jurors.

In support of the learned Judge's Charge, there can be therefore but two arguments:—either that the Defendant's evidence, namely, the advertisement;—Mr. Jones's evidence in confirmation of its having been published *bonâ fide*;—and the evidence to character to strengthen that construction, were not sufficient proof that the Dean believed the publication meritorious, and published it in vindication of his honest intentions:—or else, that, even admitting it to establish that fact, it did not amount to such an exculpation as to be evidence on not guilty, so as to warrant a verdict.—I give the learned Judge his choice of the alternative.

As to the first, viz. Whether it showed *honest intention* in point of *fact*; that surely was a question for the Jury. If the learned Judge had thought it

was not sufficient evidence to warrant the Jury's believing that the Dean's motives were such as he had declared them, he should have given his opinion of it as a point of evidence, and left it there. I cannot condescend to go further; it would be ridiculous to argue a self-evident proposition.

As to the second, That even if the Jury had believed from the evidence, that the Dean's intention was wholly innocent, it did not amount to an excuse, and therefore should not have been left to them. Does the learned Judge mean to say, that if the Jury had declared, "We find that the Dean "published this pamphlet, whether a libel or not "we do not find; and we find further, that believ- "ing it in his conscience to be meritorious and in- "nocent, he, *bonâ fide*, published it with the pre- "fixed advertisement, as a vindication of his cha- "racter from the seditious intentions, and not to "excite sedition:" does the Judge mean to say, that on such a special verdict he could have pronounced a criminal judgment?—If, on making the report, he says yes, I shall have leave to argue it.

If he says NO, then why was the consideration of that evidence, by which those facts might have been found, withdrawn from the Jury, even after they had brought in a verdict, guilty of publishing ONLY, which, in the case of the King against Woodfall, was only said not to negative the criminal intention, because that Defendant had called no witnesses? Why did he confine his inquiries to the innuendos? and find-

ing the Jury agreed upon them, why did he declare them to be bound to affix the epithet of Guilty, without asking them if they believed the Defendant's evidence to rebut the criminal inference? Some of the Jury meant to negative the criminal inference, by adding the word *only*, and all would have done it, if they had thought themselves at liberty to enter upon the evidence of the advertisement. *But they were told expressly that they had nothing to do with the consideration of that evidence, which, if believed, would have warranted that verdict.* The conclusion is evident;—if they had a right to consider it, and their consideration might have produced such a verdict, and if such a verdict would have been an acquittal, it must be a misdirection.

It seems to me therefore, that, to support the learned Judge's directions, the very cases relied on in support of them must be abandoned; since, even upon their authority, the criminal intention, though a legal inference from the fact of publishing, in the absence of proof from the Defendant, becomes a question of fact, when he offers proof in exculpation to the Jury;—the foundation of my motion therefore is clear.

I first deny the authority of these modern cases, and rely upon the rights of Juries, as established by the ancient law and custom of England, and hold that the Judge's Charge confines that right, and its exercise, though not the power in the Jury to find a general verdict of acquittal.

I assert further, that, whatever were the Judge's intentions, the Jury could not but collect that restriction from his Charge;—that all free agency was therefore destroyed in them, from respect to authority, in opposition to reason;—and that therefore the Defendant has had no trial which this Court can possibly sanction by supporting the verdict. But if the Court should be resolved to support its own late determinations, I must content myself even with *their* protection; they are certainly not the shield with which, in a contest for freedom, I should wish to combat, but they are sufficient for my protection: it is impossible to reconcile the learned Judge's directions with any of them.

My Lord, I shall detain the Court no longer at present.—The people of England are deeply interested in this great question; and though they are not insensible to that interest, yet they do not feel it in its real extent. The dangerous consequences of the doctrines established on the subject of libel are obscured from the eyes of many, from their not feeling the immediate effects of them in daily oppression and injustice:—but that security is temporary and fallacious; it depends upon the convenience of Government for the time being, which may not be interested in the sacrifice of individuals, and in the temper of the magistrate who administers the criminal law, as the head of this Court. I am one of those who could almost lull myself by these reflections from the apprehension of *immediate* mischief, even from

the law of libel laid down by your Lordship, if you were always to continue to administer it yourself. I should feel a protection in the gentleness of your character; in the love of justice which its own intrinsic excellence forces upon a mind enlightened by science, and enlarged by liberal education, and in that dignity of disposition which grows with the growth of an illustrious reputation, and becomes a sort of pledge to the public for security: but such a security is as a shadow which passeth away;—you cannot, my Lord, be immortal, and how can you answer for your successor? if you maintain the doctrines which I seek to overturn, you render yourself responsible for all the abuses that may follow from them to our latest posterity.

My Lord, whatever may become of the liberties of England, it shall never be said that they perished without resistance, when under my protection.

On this motion the Court granted a rule to show cause why there should not be a new trial—and cause was accordingly shown by the Counsel for the Crown on the 15th of November following; their arguments were taken in short-hand by Mr. Blanchard, but were never published;—they relied, however, altogether upon the authorities cited by Mr. Justice Buller, in his Charge to the Jury, and upon the uniform practice of the Court of King's Bench, for more than fifty years. The following

Speech, in support of the new trial, which was taken at the same time by Mr. Blanchard, was soon after published by Mr. Erskine's authority, in order to attract the attention of the public to the Libel Bill, which Mr. Fox was then preparing for the consideration of Parliament.

Argument *in the King's Bench, in support of the Rights of Juries. By the Honourable* Thomas Erskine.

I am now to have the honour to address myself to your Lordship in support of the rule granted to me by the Court upon Monday last; which, as Mr. Bearcroft has truly said, and seemed to mark the observation with peculiar emphasis, is a rule for a new trial. Much of my argument, according to his notion, points another way; whether its direction be true, or its force adequate to the object, it is now my business to show.

In rising to speak at this time, I feel all the advantage conferred by the reply over those whose arguments are to be answered; but I feel a disadvantage likewise which must suggest itself to every intelligent mind. In following the objections of so many learned persons, offered under different arrangements upon a subject so complicated and comprehensive, there is much danger of being drawn from that method and order, which can alone fasten conviction upon unwilling minds, or drive them from the shelter which ingenuity never fails to find in the labyrinth of a desultory discourse.

The sense of that danger, and my own inability to struggle against it, led me originally to deliver to the Court certain written and maturely considered propositions, from the establishment of which I resolved not to depart, nor to be removed, either in substance or in order, in any stage of the proceedings, and by which I must therefore this day unquestionably stand or fall.

Pursuing this system I am vulnerable two ways, and in two ways only. Either it must be shown that my propositions are not valid in law; or, admitting their validity, that the learned Judge's Charge to the Jury at Shrewsbury was not repugnant to them: there can be no other possible objections to my application for a new trial. My duty to-day is therefore obvious and simple; it is, first, to re-maintain those propositions; and then to show, that the Charge delivered to the Jury at Shrewsbury was founded upon the absolute denial and reprobation of them.

I begin, therefore, by saying again in my own original words, that when a bill of indictment is found, or an information filed, charging any crime or misdemeanor known to the law of England, and the party accused puts himself upon the country by pleading the general issue,—Not guilty;—the Jury are GENERALLY charged with his deliverance from that CRIME, and not SPECIALLY from the *fact or facts*, in the commission of which the indictment or information charges the crime to consist; much less

from any single fact, to the exclusion of others charged upon the same record.

Secondly, that no act, which the law in its general theory holds to be criminal, constitutes in itself a crime, abstracted from the mischievous intention of the actor. And that the intention, even where it becomes a simple inference of legal reason from a fact or facts established, may and ought to be collected by the Jury, with the Judge's assistance. Because the act charged, though established as a fact in a trial *on the general issue*, does not necessarily and unavoidably establish the criminal intention by any ABSTRACT conclusion of law: the establishment of the fact being still no more than full evidence of the crime, but not the crime itself; unless the Jury render it so themselves, by referring it voluntarily to the Court by special verdict.

These two propositions, though worded with cautious precision, and in technical language, to prevent the subtlety of legal disputation in opposition to the plain understanding of the world, neither do nor were intended to convey any other sentiment than this: viz. that in all cases where the law either directs or permits a person accused of a crime to throw himself upon a Jury for deliverance, by pleading *generally* that he is not guilty; the Jury, thus legally appealed to, may deliver him from the accusation by a general verdict of acquittal founded (as in common sense it evidently must be) upon an investigation as general and comprehensive

as the charge itself from which it is a general deliverance.

Having said this, I freely confess to the Court, that I am much at a loss for any further illustration of my subject; because I cannot find any matter by which it might be further illustrated, so clear, or so indisputable, either in fact or in law, as the very proposition itself which upon this trial has been brought into question. Looking back upon the ancient constitution, and examining with painful research the original jurisdictions of the country, I am utterly at a loss to imagine from what sources these novel limitations of the rights of Juries are derived. Even the Bar is not yet trained to the discipline of maintaining them. My learned friend Mr. Bearcroft solemnly abjures them:—he repeats to-day what he avowed at the trial, and is even jealous of the imputation of having meant less than he expressed; for when speaking this morning of the *right* of the Jury to judge of the whole charge, your Lordship corrected his expression, by telling him he meant the *power*, and not the *right*; he caught instantly at your words, disavowed your explanation; and, with a consistency which does him honour, declared his adherence to his original admission in its full and obvious extent.—"I did not "mean," said he, "merely to acknowledge that "the Jury have the *power*; for their power nobody "ever doubted; and, if a Judge was to tell them "they had it not, they would only have to laugh

" at him, and convince him of his error, by find-
" ing a general verdict which must be recorded: I
" meant, therefore, to consider it as a *right*, as an
" important privilege, and of great value to the
" constitution."

Thus Mr. Bearcroft and I are perfectly agreed; I never contended for more than he has voluntarily conceded. I have now his express authority for repeating, in my own former words, that the Jury have not merely the *power* to acquit, upon a view of the whole charge, without control or punishment, and without the possibility of their acquittal being annulled by any other authority; but that they have *a constitutional, legal right to do it*; *a right fit to be exercised*; and intended by the wise founders of the government, to be a protection to the lives and liberties of Englishmen, against the encroachments and perversions of authority in the hands of fixed magistrates.

But this candid admission on the part of Mr. Bearcroft, though very honourable to himself, is of no importance to me; since, from what has already fallen from your Lordship, I am not to expect a ratification of it from the Court; it is therefore my duty to establish it. I feel all the importance of my subject, and nothing shall lead me to-day to go out of it. I claim all the attention of the Court, and the right to state every authority which applies in my judgment to the argument, without being supposed to introduce them for other purposes than

my duty to my Client, and the constitution of my country, warrants and approves.

It is not very usual, in an English Court of Justice, to be driven back to the earliest history and original elements of the constitution, in order to establish the first principles which mark and distinguish English law:—they are always assumed, and, like axioms in science, are made the foundations of reasoning without being proved. Of this sort our ancestors, for many centuries, must have conceived the right of an English Jury to decide upon every question which the forms of the law submitted to their final decision; since, though they have immemorially exercised that supreme jurisdiction, we find no trace in any of the ancient books of its ever being brought into question. It is but as yesterday, when compared with the age of the law itself, that Judges, unwarranted by any former judgments of their predecessors, without any new commission from the Crown, or enlargement of judicial authority from the Legislature, have sought to fasten a limitation upon the rights and privileges of Jurors, totally unknown in ancient times, and palpably destructive of the very end and object of their institution.

No fact, my Lord, is of more easy demonstration; for the history and laws of a free country lie open—even to vulgar inspection.

During the whole Saxon æra, and even long after the establishment of the Norman government,

the whole administration of justice, criminal and civil, was in the hands of the people, without the control or intervention of any judicial authority, delegated to fixed magistrates by the Crown. The tenants of every manor administered civil justice to one another in the court-baron of their lord; and their crimes were judged of in the leet, every suitor of the manor giving his voice as a juror, and the steward being only the register,—and not the judge. On appeals from these domestic jurisdictions to the county-court, and to the torn of the sheriff, or in suits and prosecutions originally commenced in either of them, the sheriff's authority extended no further than to summon the jurors, to compel their attendance, ministerially to regulate their proceedings, and to enforce their decisions; and even where he was specially empowered by the King's writ of *justices* to proceed in causes of superior value, no *judicial* authority was thereby conferred upon himself, but only a more enlarged jurisdiction ON THE JURORS, who were to try the cause mentioned in the writ.

It is true that the sheriff cannot now intermeddle in pleas of the Crown; but with this exception, which brings no restrictions on Juries, these jurisdictions remain untouched at this day: —intricacies of property have introduced other forms of proceeding, but the constitution is the same.

This popular judicature was not confined to particular districts, or to inferior suits and misdemeanors,

but pervaded the whole legal constitution; for, when the Conqueror, to increase the influence of his crown, erected that great superintending Court of Justice in his own palace, to receive appeals criminal and civil from every court in the kingdom, and placed at the head of it the *capitalis justiciarius totius Angliæ*, of whose original authority the Chief Justice of this Court is but a partial and feeble emanation: even that great magistrate was in the *aulâ regis* merely ministerial; every one of the King's tenants, who owed him service in right of a barony, had a seat and a voice in that high tribunal; and the office of justiciar was but to record and to enforce their judgments.

In the reign of King Edward the First, when this great office was abolished, and the present Courts at Westminster established by a distribution of its powers; the barons preserved that supreme superintending jurisdiction which never belonged to the justiciar, but to themselves only as the jurors in the King's court: a jurisdiction which, when nobility, from being territorial and feodal, became personal and honorary, was assumed and exercised by the peers of England, who, without any delegation of judicial authority from the Crown, form to this day the supreme and final court of English law, judging in the last resort for the whole kingdom, and sitting upon the lives of the peerage, in their ancient and genuine character, as the *pares* of one another.

When the courts at Westminster were established in their present forms, and when the civilization and commerce of the nation had introduced more intricate questions of justice, the judicial authority in civil cases could not but enlarge its bounds; the rules of property in a cultivated state of society became by degrees beyond the compass of the unlettered multitude; and in certain well-known restrictions undoubtedly fell to the Judges: yet more perhaps from necessity than by consent, as all judicial proceedings were artfully held in the Norman language, to which the people were strangers.

Of these changes in judicature, immemorial custom, and the acquiescence of the legislature, are the evidence, which establish the jurisdiction of the Courts on the true principle of English law, and measure the extent of it by their ancient practice.

But no such evidence is to be found of the least relinquishment or abridgment of popular judicature *in cases of crimes*; on the contrary, every page of our history is filled with the struggles of our ancestors for its preservation. The law of property changes with new objects, and becomes intricate as it extends its dominion;—but crimes must ever be of the same easy investigation:—they consist wholly in intention, and the more they are multiplied by the policy of those who govern, the more absolutely the public freedom depends upon the people's preserving the entire administration of criminal justice to

themselves. In a question of property between two private individuals, the Crown can have no possible interest in preferring the one to the other: but it may have an interest in crushing both of them together, in defiance of every principle of humanity and justice, if they should put themselves forward in a contention for public liberty, against a government seeking to emancipate itself from the dominion of the laws. No man in the least acquainted with the history of nations, or of his own country, can refuse to acknowledge, that if the administration of criminal justice were left in the hands of the Crown, or its deputies, no greater freedom could possibly exist, than government might choose to tolerate from the convenience or policy of the day.

My Lord, this important truth is no discovery or assertion of mine, but is to be found in every book of the law: whether we go up to the most ancient authorities, or appeal to the writings of men of our own times, we meet with it alike in the most emphatical language. Mr. Justice Blackstone, by no means biassed towards democratical government, having in the third volume of his Commentaries explained the excellence of the trial by Jury in civil cases, expresses himself thus: vol. iv. p. 349: "But "it holds much stronger in criminal cases; since "in times of difficulty and danger, more is to be "apprehended from the violence and partiality of "Judges appointed by the Crown, in suits between

" the King and the subject, than in disputes be-
" tween one individual and another, to settle the
" boundaries of private property. Our law ha ,
" therefore, wisely placed this strong and two-fold
" barrier of a presentment and trial by Jury, be-
" tween the liberties of the people and the prero-
" gative of the Crown: without this barrier, Jus-
" tices of *oyer* and *terminer* named by the Crown,
" might, as in France or in Turkey, imprison, dis-
" patch, or exile, any man that was obnoxious to
" government, by an instant declaration that such
" was their will and pleasure. So that the liberties
" of England cannot but subsist so long as this
" palladium remains sacred and inviolate, not only
" from all open attacks, which none will be so hardy
" as to make, but also from all secret machinations,
" which may sap and undermine it."

But this remark, though it derives new force in being adopted by so great an authority, was no more original in Mr. Justice Blackstone than in me: the institution and authority of Juries is to be found in Bracton, who wrote above five hundred years before him. " The *curia* and the *pares*," says he, " were necessarily the judges in all cases of life, " limb, crime, and disherison of the heir in capite. " The King could not decide, for then he would " have been both Prosecutor and Judge; neither " could his justices, for they represent him *."

* Vide likewise Mr. Reeves' very ingenious History of the English Law.

Notwithstanding all this, the learned Judge was pleased to say, at the trial, that there was no difference between civil and criminal cases. I say, on the contrary, independent of these authorities, that there is not, even to vulgar observation, the remotest similitude between them.

There are four capital distinctions between prosecutions for crimes, and civil actions, every one of which deserves consideration.

First, In the jurisdiction necessary to found the charge.

Secondly, In the manner of the Defendant's pleading to it.

Thirdly, in the authority of the verdict which discharges him.

Fourthly, In the independence and security of the Jury from all consequences in giving it.

As to the first, it is unnecessary to remind your Lordships, that, in a civil case, the party who conceives himself aggrieved, states his complaint to the Court,—avails himself at his own pleasure of its process,—compels an answer from the Defendant by its authority,—or taking the charge *pro confesso* against him on his default, is entitled to final judgment and execution for his debt, without any interposition of a Jury. But in criminal cases it is otherwise; the Court has no cognizance of them, without leave from the people forming a grand inquest. If a man were to commit a capital offence in the face of all the Judges of England, their united authority could

not put him upon his trial:—they could file no complaint against him, even upon the records of the supreme criminal Court, but could only commit him for safe custody, which is equally competent to every common Justice of the Peace:—the Grand Jury alone could arraign him, and in their discretion might likewise finally discharge him, by throwing out the bill, with the names of all your Lordships as witnesses on the back of it. If it shall be said, that this exclusive power of the Grand Jury does not extend to lesser misdemeanors, which may be prosecuted by information; I answer, that for that very reason it becomes doubly necessary to preserve the power of the other Jury which is left. In the rules of pleading, there is no distinction between capital and lesser offences; and the Defendant's plea of Not guilty (which universally prevails as the legal answer to every information or indictment, as opposed to special pleas to the Court in civil actions), and the necessity imposed upon the Crown to join the general issue, are absolutely decisive of the present question.

Every lawyer must admit, that the rules of pleading were originally established to mark and to preserve the distinct jurisdictions of the Court and the Jury, by a separation of the law from the fact, wherever they were intended to be separated. A person charged with owing a debt, or having committed a trespass; &c. &c. if he could not deny the facts on which the actions were founded, was obliged to sub-

mit his justification for matter of law by a special plea to the Court upon the record; to which plea the Plaintiff might demur, and submit the legal merits to the Judges. By this arrangement, no power was ever given to the Jury, by an issue joined before them, but when a right of decision, as comprehensive as the issue, went along with it:—if a Defendant in such civil actions pleaded the general issue instead of a special plea, aiming at a general deliverance from the charge, by showing his justification to the Jury at the trial; the Court protected its own jurisdiction, by refusing all evidence of the facts on which such justification was founded. The extension of the general issue beyond its ancient limits, and in deviation from its true principle, has introduced some confusion into this simple and harmonious system; but the law is substantially the same.—No man, at this day, in any of those actions where the ancient forms of our jurisprudence are still wisely preserved, can possibly get at the opinion of a Jury upon any question, not intended by the constitution for their decision. In actions of debt, detinue, breach of covenant, trespass, or replevin, the Defendant can only submit the mere fact to the Jury; the law must be pleaded to the Court: if, dreading the opinion of Judges, he conceals his justification under the cover of a general plea in hopes of a more favourable construction of his defence at the trial; its very existence can never even come within the knowledge of the Jurors; every legal defence must

arise out of facts, and the authority of the Judge is interposed, to prevent their appearing before a tribunal which, in such cases, has no competent jurisdiction over them.

By imposing this necessity of pleading every legal justification to the Court, and by this exclusion of all evidence on the trial beyond the negation of the fact; the Courts indisputably intended to establish, and did in fact effectually secure the judicial authority over legal questions from all encroachment or violation; and it is impossible to find a reason in law, or in common sense, why the same boundaries between the fact and the law should not have been at the same time extended to criminal cases by the same rules of pleading, if the jurisdiction of the Jury had been designed to be limited to the fact, as in civil actions.

But no such boundary was ever made or attempted; on the contrary, every person, charged with any crime by an indictment or information, has been in all times, from the Norman conquest to this hour, not only permitted, but even bound to throw himself upon his country for deliverance, by the general plea of Not guilty; and may submit his whole defence to the Jury, whether it be a negation of the fact, or a justification of it in law; and the Judge has no authority, as in a civil case, to refuse such evidence at the trial, as out of the issue, and as *coram non judice*;—an authority which in common sense he certainly would have, if the Jury had no higher juris-

diction in the one case than in the other. The general plea thus sanctioned by immemorial custom, so blends the law and the fact together, as to be inseparable but by the voluntary act of the Jury in finding a special verdict: the general investigation of the whole charge is therefore before them; and although the Defendant admits the fact laid in the information or indictment, he nevertheless, under his general plea, gives evidence of others which are collateral, referring them to the judgment of the Jury, as a legal excuse or justification, and receives from their verdict a complete, general, and conclusive deliverance.

Mr. Justice Blackstone, in the fourth volume of his Commentaries, page 339, says, "The traitorous "or felonious intent are the points and very gist of "the indictment, and must be answered directly by "the general negative, Not guilty; and the Jury "will take notice of any defensive matter, and give "their verdict accordingly, as effectually as if it were "specially pleaded."

This, therefore, says Sir Matthew Hale, in his Pleas of the Crown, page 258, is, upon all accounts, the most advantageous plea for the Defendant: "It would be a most unhappy case for the "Judge himself, if the prisoner's fate depended upon "his directions:—unhappy also for the prisoner; "for if the Judge's opinion must rule the verdict, "the trial by Jury would be useless."

My Lord, the conclusive operation of the verdict

when given, and the security of the Jury from all consequences in giving it, render the contrast between criminal and civil cases striking and complete. No new trial can be granted, as in a civil action :— your Lordships, however you may disapprove of the acquittal, have no authority to award one ; for there is no precedent of any such upon record ; and the discretion of the Court is circumscribed by the law.

Neither can the Jurors be attainted by the Crown. In Bushel's case, Vaughan's Reports, page 146, that learned and excellent Judge expressed himself thus : " There is no case in all the law of an attaint " for the King, nor any opinion but that of Thyr- " ning's, 10th of Henry IV., title Attaint, 60 and " 64, for which there is no warrant in law, though " there be other specious authority against it, touched " by none that have argued this case."

Lord Mansfield. To be sure it is so.

Mr. Erskine. Since that is clear, my Lord, I shall not trouble the Court farther upon it : indeed I have not been able to find any one authority for such an attaint but a dictum in Fitzherbert's Natura Brevium, page 107 ; and on the other hand, the doctrine of Bushel's case is expressly agreed to in very modern times : vide Lord Raymond's Reports, 1st volume, page 469.

If, then, your Lordships reflect but for a moment upon this comparative view of criminal and civil cases which I have laid before you ; how can it be

seriously contended, not merely that there is no difference, but that there is any the remotest similarity between them? In the one case, the power of accusation begins from the Court;—in the other, from the people only; forming a Grand Jury.—In the one, the Defendant must plead a special justification, the merits of which can only be decided by the Judges;—in the other, he may throw himself for general deliverance upon his country.—In the first the Court may award a new trial, if the verdict for the Defendant be contrary to the evidence or the law;—in the last it is conclusive and unalterable;—and to crown the whole, the King never had that process of attaint which belonged to the meanest of his subjects.

When these things are attentively considered, I might ask those who are still disposed to deny the right of the Jury to investigate the whole charge, whether such a solecism can be conceived to exist in any human government, much less in the most refined and exalted in the world, as that a power of supreme judicature should be conferred at random by the blind forms of the law, where no right was intended to pass with it; and which was upon no occasion and under no circumstance to be exercised; which, though exerted notwithstanding in every age and in a thousand instances, to the confusion and discomfiture of fixed magistracy, should never be checked by authority, but should continue on from century to century; the revered guardian of liberty

and of life, arresting the arm of the most headstrong governments in the worst of times, without any power in the Crown or its Judges, to touch, without its consent, the meanest wretch in the kingdom, or even to ask the reason and principle of the verdict which acquits him.—That such a system should prevail in a country like England, without either the original institution or the acquiescing sanction of the legislature, is impossible. Believe me, my Lord, no talents can reconcile, no authority can sanction such an absurdity;—the common sense of the world revolts at it.

Having established this important right in the Jury beyond all possibility of cavil or controversy, I will now show your Lordship, that its existence is not merely consistent with the theory of the law, but is illustrated and confirmed by the universal practice of all Judges; not even excepting Mr. Justice Forster himself, whose writings have been cited in support of the contrary opinion. How a man expresses his abstract ideas is but of little importance when an appeal can be made to his plain directions to others, and to his own particular conduct: but even none of his expressions, when properly considered and understood, militate against my position.

In his justly celebrated book on the criminal law, page 256, he expresses himself thus: "The construction which the law putteth upon fact STATED "AND AGREED OR FOUND by a Jury, *is in all cases "undoubtedly the proper province of the Court.*"

Now if the adversary is disposed to stop here, though the author never intended he should, as is evident from the rest of the sentence, yet I am willing to stop with him, and to take it as a substantive proposition; for the slightest attention must discover that it is not repugnant to any thing which I have said. Facts *stated and agreed*, or facts *found*, by a Jury, which amount to the same thing, constitute a special verdict; and who ever supposed that the law upon a special verdict was not the province of the Court? Where in a trial upon a general issue the parties choose to agree upon facts and to state them, or the Jury choose voluntarily to find them without drawing the legal conclusion themselves; who ever denied that in such instances the Court is to draw it?—That Forster meant nothing more than that the Court was to judge of the law, when the Jury thus voluntarily prays its assistance by special verdict, is evident from his words which follow, for he immediately goes on to say; in cases of doubt and REAL difficulty, it is therefore commonly recommended to the Jury to state facts and circumstances in a special verdict: but neither here, nor in any other part of his works, is it said or insinuated that they are *bound* to do so, but at their own free discretion: indeed, the very term *recommended*, admits the contrary, and requires no commentary. I am sure I shall never dispute the wisdom or expediency of such a recommendation in those cases of doubt, because the more I am contending for the existence

of such an important right, the less it would become me to be the advocate of rashness and precipitation in the exercise of it. It is no denial of jurisdiction to tell the greatest magistrate upon earth to take good counsel in cases of real doubt and difficulty.—Judges upon trials, whose authority to state the law is indisputable, often refer it to be more solemnly argued before the Court; and this Court itself often holds a meeting of the twelve Judges before it decides on a point upon its own records, of which the others have confessedly no cognizance till it comes before them by the writ of error of one of the parties.—These instances are monuments of wisdom, integrity, and discretion, but they do not bear in the remotest degree upon jurisdiction: the sphere of jurisdiction is measured by what may or may not be decided by any given tribunal with legal effect, not by the rectitude or error of the decision. If the Jury, according to these authorities, may determine the whole matter by their verdict, and if the verdict when given is not only final and unalterable, but must be enforced by the authority of the Judges, and executed, if resisted, by the whole power of the state,—upon what principle of government or reason can it be argued not to be law? That the Jury are in this exact predicament is confessed by Forster; for he concludes with saying, that when the law is clear, the Jury, under the direction of the Court, in point of law *may*, and if they are well advised will, *always find a general verdict conformably to such directions.*

This is likewise consistent with my position: if the law be clear, we may presume that the Judge states it clearly to the Jury; and if he does, undoubtedly the Jury, if they are well advised, will find according to such directions; for they have not a capricious discretion to make law at their pleasure, but are bound in conscience as well as Judges are to find it truly; and, generally speaking, the learning of the Judge who presides at the trial affords them a safe support and direction.

The same practice of Judges in stating the law to the Jury, as applied to the particular case before them, appears likewise in the case of the King against Oneby, 2d Lord Raymond, page 1494. "On the "trial the Judge directs the Jury thus: If you be- "lieve such and such witnesses who have sworn to "such and such facts, *the killing of the deceased* "*appears to be with malice prepense:* but if you do "not believe them, then you ought to find him "guilty of manslaughter; and the Jury may, if they "think proper, give a general verdict of murder "or manslaughter: *but if they decline* giving a ge- "neral verdict, and *will* find the facts specially, the "Court is then to form their judgment from the "facts found, whether the Defendant be guilty or "not guilty, *i. e.* whether the act was done with "malice and deliberation, or not."—Surely language can express nothing more plainly or unequivocally, than that where the general issue is pleaded to an indictment, the law and the fact are both before the

Jury; and that the former can never be separated from the latter, for the judgment of the Court, unless by their own spontaneous act: for the words are, "If they *decline* giving a general verdict, and "*will* find the facts specially, the Court is THEN to "form their judgment from the facts found." So that, after a general issue joined, the authority of the Court only commences when the Jury chooses to decline the decision of the law by a general verdict; the right of declining which legal determination, is a privilege conferred on them by the statute of Westminster 2d, and by no means a restriction of their powers.

But another very important view of the subject remains behind: for supposing I had failed in establishing that contrast between criminal and civil cases, which is now too clear not only to require, but even to justify another observation, the argument would lose nothing by the failure; the similarity between criminal and civil cases derives all its application to the argument from the learned Judge's supposition, that the jurisdiction of the Jury over the law was never contended for in the latter, and consequently on a principle of equality could not be supported in the former; whereas I do contend for it, and can incontestably establish it in both. This application of the argument is plain from the words of the Charge: "If the Jury could find the law, it would undoubt-"edly hold in civil cases as well as criminal: but "was it ever supposed that a Jury was competent to

" say the operation of a fine, or a recovery, or a " warranty, which are mere questions of law ?"

To this question I answer, that the competency of the Jury in such cases is contended for to the full extent of my principle, both by Lyttleton and by Coke: they cannot indeed decide upon them *de plano*, which, as Vaughan truly says, is unintelligible, because an unmixed question of law can by no possibility come before them for decision ; but whenever (which very often happens) the operation of a fine, a recovery, a warranty, or any other record or conveyance known to the law of England comes forward, mixed with the fact on the general issue, the Jury have then most unquestionably a right to determine it ; and what is more, no other authority possibly can ; because, when the general issue is permitted by law, these questions cannot appear on the record for the judgment of the Court, and although it can grant a new trial, yet the same question must ultimately be determined by another Jury. This is not only self-evident to every lawyer, but, as I said, is expressly laid down by Lyttleton in the 368th section. " Also in such case where the inquest may " give their verdict at large, if they will take upon " them the knowledge of the law upon the matter, " they may give their verdict generally as it is put " in their charge: as in the case aforesaid they may " well say, that the lessor did not disseise the lessee " if they will." Coke, in his commentary on this section, confirms Lyttleton ; saying, that in doubtful cases they should find specially for fear of an attaint ;

and it is plain that the statute of Westminster the 2d, was made either to give or to confirm the right of the Jury to find the matter specially, leaving their jurisdiction over the law as it stood by the common law. The words of the statute of Westminster 2d, chapter 30th, are, "*Ordinatum est quod justitiarii ad assisas* "*capiendas assignati,* NON COMPELLANT *juratores* "*dicere precise si sit disseisina vel non*; *dummodo vo-* "*luerint dicere veritatem facti et petere auxilium jus-* "*titiariorum.*" From these words it should appear, that the jurisdiction of the Jury over the law when it came before them on the general issue, was so vested in them by the constitution, that the exercise of it in all cases had been considered to be compulsory upon them, and that this act was a legislative relief from that compulsion in the case of an assize of disseizin: it is equally plain from the remaining words of the act, that their jurisdiction remained as before; "*sed si sponte velint dicere quod disseisina* "*est vel non, admittatur eorum veredictum sub suo* "*periculo.*"

But the most material observation upon this statute, as applicable to the present subject, is, that the terror of the attaint from which it was passed to relieve them, having (as has been shewn) no existence in cases of crime, the act only extended to relieve the Jury at their discretion from finding the law in civil actions; and consequently it is only from custom, and not from positive law, that they are not *even compellable* to give a general verdict involving a judgment of law on every criminal trial.

These principles and authorities certainly establish that it is the duty of the Judge, on every trial where the general issue is pleaded, to give to the Jury his opinion on the law as applied to the case before them; and that they must find a general verdict comprehending a judgment of law, unless they *choose* to refer it specially to the Court.

But we are here, in a case where it is contended, that the duty of the Judge is the direct contrary of this:—that he is to give no opinion at all to the Jury upon the law as applied to the case before them;—that they likewise are to refrain from all consideration of it, and yet that the very same general verdict comprehending both fact and law, is to be given by them as if the whole legal matter had been summed up by the one and found by the other.

I confess I have no organs to comprehend the principle on which such a practice proceeds. I contended for nothing more at the trial than the very practice recommended by Forster and Lord Raymond:—I addressed myself to the Jury upon the law with all possible respect and deference, and indeed with very marked personal attention to the learned Judge: so far from urging the Jury, dogmatically to think for themselves without his constitutional assistance, I called for his opinion on the question of libel; saying, that if he should tell them distinctly the paper indicted was libellous, though I should not admit that they were bound at all events to give effect to it

if they felt it to be innocent; yet I was ready to agree that they ought not to go against the Charge without great consideration: but that if he should shut himself up in silence, giving no opinion at all upon the criminality of the paper from which alone any guilt could be fastened on the publisher, and should narrow their consideration to the publication, I entered my protest against their finding a verdict affixing the epithet of *guilty* to the mere fact of publishing a paper, the *guilt* of which had not been investigated. If, after this address to the Jury, the learned Judge had told them, that in his opinion the paper was a libel, but still leaving it to their judgments, and likewise the Defendant's evidence to their consideration, had further told them, that he thought it did not exculpate the publication; and if in consequence of such directions the Jury had found a verdict for the Crown, I should never have made my present motion for a new trial; because I should have considered such a verdict of Guilty as founded upon the opinion of the Jury on the whole matter as left to their consideration, and must have sought my remedy by arrest of judgment on the record.

But the learned Judge took a direct contrary course:—he gave no opinion at all on the guilt or innocence of the paper;—he took no notice of the Defendant's evidence of intention:—he told the Jury, in the most explicit terms, that neither the one nor the other were within their jurisdiction; and upon the mere fact of publication directed a general

verdict comprehending the epithet of *Guilty*, after having expressly withdrawn from the Jury every consideration of the merits of the paper published, or the intention of the publisher, from which it is admitted on all hands the *guilt* of publication could alone have any existence.

My motion is therefore founded upon this obvious and simple principle; that the Defendant has had in fact NO TRIAL; having been found *guilty* without any investigation of his *guilt*, and without any power left to the Jury to take cognizance of his innocence. I undertake to show, that the Jury could not possibly conceive or believe from the Judge's Charge, that they had any jurisdiction to acquit him; however they might have been impressed even with the merit of the publication, or convinced of his meritorious intention in publishing it: nay, what is worse, while the learned Judge totally deprived them of their whole jurisdiction over the question of libel and the Defendant's seditious intention, he at the same time directed a general verdict of Guilty, which comprehended a judgment upon both.

When I put this construction on the learned Judge's direction, I found myself wholly on the language in which it was communicated; and it will be no answer to such construction, that no such restraint was meant to be conveyed by it. If the learned Judge's intentions were even the direct contrary of his expressions, yet if, in consequence of

that which was expressed though not intended, the Jury were abridged of a jurisdiction which belonged to them by law, and in the exercise of which the Defendant had an interest, he is equally a sufferer, and the verdict given under such misconception of authority is equally void: my application ought therefore to stand or fall by the Charge itself, upon which I disclaim all disingenuous cavilling. I am certainly bound to show, that from the general result of it, fairly and liberally interpreted, the Jury could not conceive that they had any right to extend their consideration beyond the bare fact of publication, so as to acquit the Defendant by a judgment founded on the legality of the Dialogue, or the honesty of the intention in publishing it.

In order to understand the learned Judge's direction, it must be recollected that it was addressed to them in answer to me, who had contended for nothing more than that these two considerations ought to rule the verdict; and it will be seen, that the Charge, on the contrary, not only excluded both of them by general inference, but by expressions, arguments, and illustrations the most studiously selected to convey that exclusion, and to render it binding on the consciences of the Jury. After telling them in the very beginning of his Charge, that the single question for their decision was, whether the Defendant had published the pamphlet? he declared to them, that it was not even *allowed to him, as the Judge trying the cause*, to say whether it was or was

not a libel: for that if he should say it was no libel, and they, following his direction, should acquit the Defendant, they would thereby deprive the Prosecutor of his writ of error upon the record, which was one of his dearest birthrights. The law, he said, was equal between the Prosecutor and the Defendant; that a verdict of acquittal would close the matter for ever, depriving him of his appeal; and that whatever therefore was upon the record *was not for their decision*, but might be carried at the pleasure of either party to the House of Lords.

Surely language could not convey a limitation upon the right of the Jury over the question of libel, or the intention of the publisher, more positive or more universal. It was positive, inasmuch as it held out to them that such a jurisdiction could not be entertained without injustice; and it was universal, because the principle had no special application to the particular circumstances of that trial; but subjected every Defendant upon every prosecution for a libel, to an inevitable conviction on the mere proof of publishing *any thing*, though both Judge and Jury might be convinced that the thing published was innocent and even meritorious.

My Lord, I make this commentary without the hazard of contradiction from any man whose reason is not disordered. For if the Prosecutor in every case has a birthright by law to have the question of libel left open upon the record, which it can only be

by a verdict of conviction on the single fact of publishing: no legal right can at the same time exist in the Jury to shut out that question by a verdict of acquittal founded upon the merits of the publication, or the innocent mind of the publisher. Rights that are repugnant and contradictory cannot be co-existent. The Jury can never have a constitutional right to do an act beneficial to the Defendant, which when done deprives the Prosecutor of a right which the same constitution has vested in him. No right can belong to one person, the exercise of which in *every instance* must necessarily work a wrong to another. If the Prosecutor of a libel has in *every* instance the privilege to try the merits of his prosecution before the Judges, the Jury can have no right in *any* instance to preclude his appeal to them by a general verdict for the Defendant.

The Jury therefore, from this part of the Charge, must necessarily have felt themselves absolutely limited (I might say even in their powers) to the fact of publication; because the highest restraint upon good men is to convince them that they cannot break loose from it without injustice: and the power of a good subject is never more effectually destroyed than when he is made to believe that the exercise of it will be a breach of his duty to the public, and a violation of the laws of his country.

But since equal justice between the Prosecutor and the Defendant is the pretence for this abridgment of jurisdiction, let us examine a little how it is affected

by it.—Do the Prosecutor and the Defendant really stand upon an equal footing by this mode of proceeding? With what decency this can be alleged, I leave those to answer who know that it is only by the indulgence of Mr. Bearcroft, of Counsel for the prosecution, that my reverend Client is not at this moment in prison *, while we are discussing this notable equality. Besides, my Lord, the judgment of this Court, though not final in the constitution, and therefore not binding on the Prosecutor, is absolutely conclusive on the Defendant. If your Lordships pronounce the record to contain no libel, and arrest the judgment on the verdict, the Prosecutor may carry it to the House of Lords, and pending his writ of error, remains untouched by your Lordship's decision. But, if judgment be against the Defendant, it is only at the discretion of the Crown (as it is said), and not of right, that he can prosecute any writ of error at all; and even if he finds no obstruction in that quarter, it is but at the best an appeal for the benefit of public liberty, from which he himself can have no personal benefit; for the writ of error being no supersedeas, the punishment is inflicted on him in the mean time. In the case of

* Lord Mansfield ordered the Dean to be committed on the motion for the new trial; and said, he had no discretion to suffer him to be at large, without consent, after his appearance in Court, on conviction. Upon which, Mr. Bearcroft gave his consent that the Dean should remain at large upon bail.

Mr. Horne *, this Court imprisoned him for publishing a libel upon its own judgment, pending his appeal from its justice; and he had suffered the utmost rigour which the law imposed upon him as a criminal, at the time that the House of Lords, with the assistance of the twelve Judges of England, were gravely assembled to determine, whether he had been guilty of any crime. I do not mention this case as hard or rigorous on Mr. Horne, as an individual: it is the general course of practice, but surely that practice ought to put an end to this argument of equality between Prosecutor and Prisoner. It is adding insult to injury, to tell an innocent man who is in a dungeon, pending his writ of error, and of whose innocence both Judge and Jury were convinced at the trial, that he is in equal scales with his Prosecutor, who is at large, because he has an opportunity of deciding after the expiration of his punishment, that the prosecution had been unfounded, and his sufferings unjust. By parity of reasoning, a prisoner in a capital case might be hanged in the mean time for the benefit of equal justice; leaving his executors to fight the battle out with his Prosecutor upon the record, through every Court in the kingdom; by which at last his attainder might be reversed, and the blood of his pos-

* Afterwards Mr. Horne Tooke, whose writings do honour to our language and country.

terity remain uncorrupted.—What justice can be more impartial or equal!

So much for this right of the Prosecutor of a libel to *compel* a Jury in every case, generally to convict a Defendant on the fact of publication, or to find a special verdict;—a right unheard of before since the birth of the constitution;—not even founded upon any equality in fact, even if such a shocking parity could exist in law, and not even contended to exist in any other case, where private men become the Prosecutors of crimes for the ends of public justice. It can have, generally speaking, no existence in any prosecution for felony; because the general description of the crime in such indictments, for the most part, shuts out the legal question in the particular instance from appearing on the record: and for the same reason, it can have no place even in appeals of death, &c. the only cases where Prosecutors appear as the revengers of their own private wrongs, and not as the representatives of the Crown.

The learned Judge proceeded next to establish the same universal limitation upon the power of the Jury, from the history of different trials, and the practice of former Judges who presided at them; and while I am complaining of what I conceive to be injustice, I must take care not to be unjust myself. I certainly do not, nor ever did consider the learned Judge's misdirection in his Charge to be peculiar to himself: it was only the resistance of the

Defendant's evidence, and what passed after the Jury returned into Court with the verdict, that I ever considered to be a departure from all precedents: the rest had undoubtedly the sanction of several modern cases; and I wish, therefore, to be distinctly understood, that I partly found my motion for a new trial in opposition to these decisions. It is my duty to speak with deference of all the judgments of this Court; and I feel an additional respect for some of those I am about to combat, because they are your Lordship's: but comparing them with the judgments of your predecessors for ages, which is the highest evidence of English law, I must be forgivven if I presume to question their authority.

My Lord, it is necessary that I should take notice of some of them as they occur in the learned Judge's Charge; for although he is not responsible for the rectitude of those precedents which he only cited in support of it, yet the Defendant is unquestionably entitled to a new trial, if their principles are not ratified by the Court: for whenever the learned Judge cited precedents to warrant the limitation on the province of the Jury imposed by his own authority, it was such an adoption of the doctrines they contained, as made them a rule to the Jury in their decision.

First, then, the learned Judge, to overturn my argument with the Jury for their jurisdiction over the whole charge, opposed your Lordship's established practice for eight-and-twenty years; and the weight

of this great authority was increased by the general manner in which it was stated; for I find no expressions of your Lordship's in any of the reported cases which go the length contended for. I find the practice, indeed, fully warranted by them: but I do not meet with the principle which can alone vindicate that practice, fairly and distinctly avowed. The learned Judge, therefore, referred to the charge of Chief Justice Raymond, in the case of the King and Franklin, in which the universal limitation contended for, is indeed laid down, not only in the most unequivocal expressions, but the ancient jurisdiction of Juries, resting upon all the authorities I have cited, treated as a ridiculous notion which had been just taken up a little before the year 1731, and which no man living had ever dreamed of before. The learned Judge observed, that Lord Raymond stated to the Jury on Franklin's trial that there were three questions: the first was, the fact of publishing the Craftsman: secondly, whether the averments in the information were true: but that the third, viz. whether it was a libel, was merely a question of *law*, with which the Jury *had nothing to do*, as had been then of late thought by some people who ought to have known better.

This direction of Lord Raymond's was fully ratified and adopted in all its extent, and given to the Jury, on the present trial, with several others of the same import, as an unerring guide for their conduct; and surely human ingenuity could not frame a more

abstract and universal limitation upon their right to acquit the Defendant by a general verdict; for Lord Raymond's expressions amount to an absolute denial of the right of the Jury to find the Defendant not guilty, if the publication and innuendos are proved. "Libel or no libel, is a question of law, "with which you, the Jury, *have nothing to do.*" How then can they have any right to give a general verdict consistently with this declaration?—Can any man in his senses collect that he has a right to decide on that with which he has nothing to do?

But it is needless to comment on these expressions, for the Jury were likewise told by the learned Judge himself, that, if they believed the fact of publication, they were *bound* to find the Defendant guilty; and it will hardly be contended, that a man has a right to refrain from doing that which he is bound to do.

Mr. Cowper, as Counsel for the prosecution, took upon him to explain what was meant by this expression; and I seek for no other construction: "The "learned Judge (said he) did not mean to deny "the right of the Jury, but only to convey, that "there was a religious and moral obligation upon "them to refrain from the exercise of it." Now, if the principle which imposed that obligation had been alleged to be *special*, applying only to the *particular case of the Dean of St. Asaph*, and consequently consistent with the right of the Jury to a more enlarged jurisdiction in *other*

instances; telling the Jury that they were bound to convict on proof of publication, might be plausibly construed into a recommendation to refrain from the exercise of their right in *that case*, and not to a *general* denial of its existence: but the moment it is recollected, that the principle which bound them was not *particular* to the instance, but abstract and universal, binding alike in *every* prosecution for a libel, it requires no logic to pronounce the expression to be an absolute, unequivocal, and universal denial of the right: common sense tells every man, that to speak of a person's right to do a thing, which yet, in every possible instance where it might be exerted, he is religiously and morally bound not to exert, is not even sophistry, but downright vulgar nonsense. But the Jury were not only limited by these modern precedents, which certainly have an existence; but were in my mind limited with still greater effect by the learned Judge's declaration, that some of those ancient authorities on which I had principally relied for the establishment of their jurisdiction, had not merely been over-ruled, but were altogether inapplicable. I particularly observed how much ground I lost with the Jury, when they were told from the Bench, that even in Bushel's case, on which I had so greatly depended, the very reverse of my doctrine had been expressly established: the Court having said unanimously in that case, according to the learned Judge's statement, that if the Jury be asked what the law is, they cannot say, and having likewise

ratified in express terms the maxim, *ad quæstionem legis non respondent juratores.*

My Lord, this declaration from the Bench, which I confess not a little staggered and surprised me, rendered it my duty to look again into Vaughan, where Bushel's case is reported: I have performed that duty, and now take upon me positively to say, that the words of Lord Chief Justice Vaughan, which the learned Judge considered as a judgment of the Court, denying the jurisdiction of the Jury over the law, *where a general issue is joined before them*, were, on the contrary, made use of by that learned and excellent person, to expose the fallacy of such a misapplication of the maxim alluded to, by the Counsel against Bushel; declaring that it had no reference to any case where the law and the fact were incorporated by the plea of Not Guilty, and confirming the right of the Jury to find the law upon every such issue, in terms the most emphatical and expressive. This is manifest from the whole report.

Bushel, one of the Jurors on the trial of Penn and Mead, had been committed by the Court for finding the Defendant not guilty, against the direction of the Court in matter of law; and being brought before the Court of Common Pleas by habeas corpus, this cause of commitment appeared upon the face of the return to the writ. It was contended by the Counsel against Bushel upon the authority of this maxim, that the commitment was legal, since it appeared by the return, that Bushel had taken upon him to find

the law against the direction of the Judge, and had been therefore legally imprisoned for that contempt. —It was upon that occasion that Chief Justice Vaughan, with the concurrence of the whole Court, repeated the maxim, *ad quæstionem legis non respondent juratores*, as cited by the Counsel for the Crown, but denied the application of it to impose any restraint upon jurors trying any crime upon the general issue. His language is too remarkable to be forgotten, and too plain to be misunderstood. Taking the words of the return to the habeas corpus, viz. "That the Jury did acquit against the "direction of the Court in matter of law;" "These words," said this great lawyer, "taken "literally and *de plano* are insignificant and un- "intelligible, for no issue can be joined of matter "of law;—no Jury can be charged with the trial "of matter of law barely:—no evidence ever was, "or can be given to a Jury of what is law or not; "nor any oath given to a Jury to try matter of law "*alone*, nor can any attaint lie for such a false oath. "Therefore we must take off this veil and colour "of words, which make a show of being some- "thing, but are in fact nothing: for if the meaning "of these words, *Finding against the direction of "the Court in matter of law*, be, that if the Judge, "having heard the evidence given in Court (for he "knows no other), shall tell the Jury upon this "evidence, that the law is for the Plaintiff or the "Defendant, and they, under the pain of fine and "imprisonment, are to find accordingly, every one

"sees that the Jury is but a troublesome delay, "great charge, and of no use in determining right "and wrong; which were a strange and new-found "conclusion, after a trial so celebrated for many hun- "dreds of years in this country."

Lord Chief Justice Vaughan's argument is therefore plainly this. Adverting to the arguments of the Counsel, he says, You talk of the maxim *ad quæstionem legis non respondent juratores*, but it has no sort of application to your subject. The words of your return, viz. that Bushel did acquit against the direction of the Court in matter of law, are unintelligible, and, as applied to the case, impossible. The Jury could not be asked in the abstract, what was the law: they could not have an issue of the law joined before them: they could not be sworn to try it. *Ad quæstionem legis non respondent juratores:* therefore to say literally and *de plano* that the Jury found the law against the Judge's direction is absurd: they could not be in a situation to find it;—an unmixed question of law could not be before them:—the Judge could not give any positive directions of law upon the trial, for the law can only arise out of facts, and the Judge cannot know what the facts are till the Jury have given their verdict. Therefore, continued the Chief Justice, let us take off this veil and colour of words, which make a show of being something, but are in fact nothing: let us get rid of the fallacy of applying a maxim, which truly describes the jurisdiction of

the Courts over issues of law, to destroy the jurisdiction of Jurors, in cases where law and fact are blended together upon a trial:—since, if the Jury at the trial are bound to receive the law from the Judge, every one sees that it is a mere mockery, and of no use in determining right and wrong.—This is the plain common sense of the argument; and it is impossible to suggest a distinction between its application to Bushel's case and to the present; except that the right of imprisoning the Jurors was there contended for, in order to enforce obedience to the directions of the Judge. But this distinction, if it deserves the name, though held up by Mr. Bearcroft as very important, is a distinction without a difference. For if, according to Vaughan, the free agency of the Jury over the whole charge, uncontrolled by the Judge's direction, constitutes the whole of that ancient mode of trial; it signifies nothing by what means that free agency is destroyed: whether by the imprisonment of conscience or of body: by the operation of their virtues or of their fears. Whether they decline exerting their jurisdiction from being told that the exertion of it is a contempt of religious and moral order, or a contempt of the Court punishable by imprisonment; their jurisdiction is equally taken away.

My Lord, I should be very sorry improperly to waste the time of the Court, but I cannot help repeating once again, that if, in consequence of the learned Judge's directions, the Jury, from a just de-

ference to learning and authority, from a nice and modest sense of duty, felt themselves not at liberty to deliver the Defendant from the whole indictment; HE HAS NOT BEEN TRIED: because though he was entitled by law to plead generally that he was not guilty; though he did in fact plead it acccordingly, and went down to trial upon it, yet the Jury have not been permitted to try that issue, but have been directed to find at all events a general verdict of Guilty; with a positive injunction not to investigate the guilt, or even to listen to any evidence of innocence.

My Lord, I cannot help contrasting this trial, with that of Colonel Gordon's but a few sessions past in London. I had in my hand but this moment, an accurate note of Mr. Baron Eyre's * Charge to the Jury on that occasion; I will not detain the Court by looking for it amongst my papers; because I believe I can correctly repeat the substance of it.

Earl of Mansfield. The case of the King against Cosmo Gordon?

Mr. Erskine. Yes, my Lord: Colonel Gordon was indicted for the murder of General Thomas, whom he had killed in a duel: and the question was, whether, if the Jury were satisfied of that fact, the prisoner was to be convicted of murder? That was, according to Forster, as much a question of law, as libel or no libel: but Mr. Baron Eyre did not

* Late Lord Chief Baron.

therefore feel himself at liberty to withdraw it from the Jury. After stating (greatly to his honour) the hard condition of the prisoner, who was brought to a trial for life, in a case where the positive law and the prevailing manners of the times were so strongly in opposition to one another, that he was afraid the punishment of individuals would never be able to beat down an offence so sanctioned; he addressed the Jury nearly in these words: "Nevertheless, gentle-"men, I am bound to declare to you, what the law "is as applied to this case, in all the different views "in which it can be considered by you upon the evi-"dence. *Of this law and of the facts as you shall "find them, your verdict must be compounded*; and I "persuade myself, that it will be such a one as to "give satisfaction to your own consciences."

Now, if Mr. Baron Eyre, instead of telling the Jury that a duel, however fairly and honourably fought, was a murder by the law of England, and leaving them to find a general verdict under that direction, had said to them, that whether such a duel was murder or manslaughter, was a question with which neither he nor they had any thing to do, and on which he should therefore deliver no opinion; and had directed them to find that the prisoner was guilty of killing the deceased in a deliberate duel, telling them, that the Court would settle the rest; that would have been directly consonant to the case of the Dean of St. Asaph. By this direction, the prisoner would have been in the hands of the Court,

and the Judges, not the Jury, would have decided upon the life of Colonel Gordon.

But the two learned Judges differ most essentially indeed. Mr. Baron Eyre conceives himself bound in duty to state the law as applied to the particular facts, and to leave it to the Jury. Mr. Justice Buller says, he is not bound nor even allowed so to state or apply it, and withdraws it entirely from their consideration. Mr. Baron Eyre tells the Jury that their verdict is to be compounded of the fact and the law. Mr. Justice Buller, on the contrary, that it is to be confined to the fact only, the law being the exclusive province of the Court. My Lord, it is not for me to settle differences of opinion between the Judges of England, nor to pronounce which of them is wrong: but, since they are contradictory and inconsistent, I may hazard the assertion that they cannot both be right: the authorities which I have cited, and the general sense of mankind which settles every thing else, must determine the rest.

My Lord, I come now to a very important part of the case, untouched I believe before in any of the arguments on this occasion.

I mean to contend, that the learned Judge's Charge to the Jury cannot be supported even upon its own principles; for, supposing the Court to be of opinion that all I have said in opposition to these principles is inconclusive, and that the question of libel, and the intention of the publisher, were properly withdrawn from the consideration of the Jury,

still I think I can make it appear that such a judgment would only render the misdirection more palpable and striking.

I may safely assume, that the learned Judge must have meant to direct the Jury either to find a general or a special verdict; or, to speak more generally, that one of these two verdicts must be the object of every Charge: because I venture to affirm, that neither the records of the Courts, the reports of their proceedings, nor the writings of lawyers, furnish any account of a third. There can be no middle verdict between both; the Jury must either try the whole issue generally, or find the facts specially, referring the legal conclusion to the Court.

I may affirm with equal certainty, that the general verdict, *ex vi termini*, is universally as comprehensive as the issue, and that consequently such a verdict on an indictment, upon the general issue, Not guilty, universally and unavoidably involves a judgment of law, as well as fact; because the charge comprehends both, and the verdict, as has been said, is coextensive with it. Both Coke and Littleton give this precise definition of a general verdict, for they both say, that if the Jury will find the law, they may do it by a general verdict, which is ever as large as the issue. If this be so, it follows by necessary consequence, that if the Judge means to direct the Jury to find generally against a Defendant, he must leave to their consideration every thing which goes to the constitution of such a general

verdict, and is therefore bound to permit them to come to, and to direct them how to form that general conclusion from the law and the fact, which is involved in the term Guilty. For it is ridiculous to say, that guilty is a fact;—it is a conclusion in law from a fact, and therefore can have no place in a special verdict, where the legal conclusion is left to the Court.

In this case the Defendant is charged, not with having published this pamphlet, but with having published a certain false, scandalous, and seditious libel, with a seditious and rebellious intention. He pleads that he is not guilty in manner and form as he is accused; which plea is admitted on all hands to be a denial of the whole charge, and consequently does not merely put in issue the fact of publishing the pamphlet; but the truth of the whole indictment, *i. e.* the publication of the libel set forth in it, with the intention charged by it.

When this issue comes down for trial, the Jury must either find the whole charge or a part of it; and admitting, for argument sake, that the Judge has a right to dictate either of these two courses; he is undoubtedly bound in law to make his direction to the Jury conformable to the one or the other. If he means to confine the Jury to the fact of publishing, considering the guilt of the Defendant to be a legal conclusion for the Court to draw from that fact, specially found on the record, he ought to direct the Jury to find that fact without affixing

the epithet of Guilty to the finding. But, if he will have a general verdict of Guilty, which involves a judgment of law as well as fact, he must leave the law to the consideration of the Jury; since when the word Guilty is pronounced by them, it is so well understood to comprehend every thing charged by the indictment, that the associate or his clerk instantly records, that the Defendant is guilty in manner and form as he is accused, *i. e.* not simply that he has *published* the pamphlet contained in the indictment;—but that he is *guilty of publishing the libel* with the wicked intentions charged on him by the record.

Now, if this effect of a general verdict of Guilty is reflected on for a moment, the illegality of directing one upon the bare fact of publishing, will appear in the most glaring colours. The learned Judge says to the Jury, whether this be a libel is not for your consideration; I can give no opinion on that subject without injustice to the Prosecutor; and as to what Mr. Jones swore concerning the Defendant's motives for the publication, that is likewise not before you: for if you are satisfied in point of fact that the Defendant *published* this pamphlet, you are bound to find him *guilty*. Why guilty, my Lord, when the consideration of guilt is withdrawn? He confines the Jury to the finding of a fact, and enjoins them to leave the legal conclusion from it to the Court; yet, instead of directing them to make that fact the subject of a special

verdict, he desires them in the same breath to find a general one ;—to draw the conclusion without any attention to the premises :—to pronounce a verdict which upon the face of the record includes a judgment upon their oaths that the paper is a libel, and that the publisher's intentions in publishing it were wicked and seditious, although neither the one nor the other made any part of their consideration.—My Lord, such a verdict is a monster in law, without precedent in former times, or root in the constitution. If it be true, on the principle of the Charge itself, that the fact of publication was all that the Jury were to find, and all that was necessary to establish the Defendant's guilt, if the thing published be a libel, why was not that fact found like all other facts upon special verdicts? Why was an epithet, which is a legal conclusion from the fact, extorted from a Jury who were restrained from forming it themselves? The verdict must be taken to be general or special : if general, it has found the whole issue without a co-extensive examination :—if special, the word Guilty, which is a conclusion from facts, can have no place in it. Either this word Guilty is operative or unessential ; an epithet of substance, or of form. It is impossible to controvert that proposition, and I give the gentlemen their choice of the alternative. If they admit it to be operative and of real substance, or, to speak more plainly, that the fact of publication found specially, without the epithet of Guilty, would have been an imperfect

verdict inconclusive of the Defendant's guilt, and on which no judgment could have followed: then it is impossible to deny that the Defendant has suffered injustice; because such an admission confesses that a criminal conclusion from a fact has been obtained from the Jury, without permitting them to exercise that judgment which might have led them to a conclusion of innocence: and that the word Guilty has been obtained from them at the trial as a mere matter of form, although the verdict without it, stating only the fact of publication which they were directed to find, to which they thought the finding alone enlarged, and beyond which they had never enlarged their inquiry, would have been an absolute verdict of acquittal. If, on the other hand, to avoid this insuperable objection to the Charge, the word Guilty is to be reduced to a mere word of form, and it is to be contended that the fact of publication found specially would have been tantamount; be it so:—let the verdict be so recorded;—let the word Guilty be expunged from it, and I instantly sit down;—I trouble your Lordships no further:—I withdraw my motion for a new trial, and will maintain in arrest of judgment, that the Dean is not convicted. But if this is not conceded to me, and the word Guilty, though argued to be but form, and though as such obtained from the Jury, is still preserved upon the record, and made use of against the Defendant as substance; it will then become us (independently of all consideration as lawyers), to consider a little

how that argument is to be made consistent with the honour of gentlemen, or that fairness of dealing which cannot but have place wherever justice is administered.

But in order to establish that the word Guilty is a word of essential substance; that the verdict would have been imperfect without it; and that therefore the Defendant suffers by its insertion; I undertake to show your Lordship, upon every principle and authority of law, that if the fact of publication, which was all that was left to the Jury, had been found by special verdict, no judgment could have been given on it.

My Lord, I will try this by taking the fullest finding which the facts in evidence could possibly have warranted. Supposing then, for instance, that the Jury had found that the Defendant published the paper according to the tenour of the indictment: that it was written of and concerning the King and his Government; and that the innuendos were likewise as averred, K. meaning the present King, and P. the present Parliament of Great Britain: on such a finding, no judgment could have been given by the Court, even if the record had contained a complete charge of a libel. No principle is more unquestionable than that, to warrant any judgment upon a special verdict, the Court which can presume nothing that is not visible on the record, must see sufficient matter upon the face of it, which, if taken to be true, is conclusive of the Defendant's guilt.

They must be able to say, If this record be true, the Defendant cannot be innocent of the crime which it charges on him. But from the facts of such a verdict the Court could arrive at no such legitimate conclusion; for it is admitted on all hands, and indeed expressly laid down by your Lordship in the case of the King against Woodfall, that publication even of a libel is not *conclusive* evidence of guilt: for that the Defendant may give evidence of an innocent publication.

Looking therefore upon a record containing a good indictment of a libel, and a verdict finding that the Defendant published it, but without the epithet of Guilty, the Court could not pronounce that he published it with the malicious intention which is the essence of the crime:—they could not say what might have passed at the trial:—for any thing that appeared to them he might have given such evidence of innocent motive, necessity, or mistake, as might have amounted to excuse or justification. They would say, that the facts stated upon the verdict would have been fully sufficient in the absence of a legal defence to have warranted the Judge to have directed, and the Jury to have given a general verdict of Guilty, comprehending the intention which constitutes the crime: but that to warrant the Bench, which is ignorant of every thing at the trial, to presume that intention, and thereupon to pronounce judgment on the record, the Jury must not merely find full evidence of the crime, but

such facts as compose its legal definition. This wise principle is supported by authorities which are perfectly familiar.

If, in an action of trover, the Plaintiff proves property in himself, possession in the Defendant, and a demand and refusal of the thing charged to be converted; this evidence unanswered is full proof of a conversion; and if the Defendant could not show to the Jury why he had refused to deliver the Plaintiff's property on a legal demand of it, the Judge would direct them to find him guilty of the conversion. But on the same facts found by special verdict, no judgment could be given by the Court: the Judges would say, If the special verdict contains the whole of the evidence given at the trial, the Jury should have found the Defendant guilty; for the conversion was fully proved, but we cannot declare these facts to amount to a conversion, for the Defendant's intention was a fact, which the Jury should have found from the evidence, over which we have no jurisdiction. So in the case put by Lord Coke, I believe in his first Institute 115, If a modus is found to have existed beyond memory till within thirty years before the trial, the Court cannot upon such facts found by special verdict pronounce against the modus: but any one of your Lordships would certainly tell the Jury, that upon such evidence they were warranted in finding against it. In all cases of prescription, the universal practice of Judges is to direct Juries, by analogy to the statute

of limitations, to decide against incorporeal rights, which for many years have been relinquished; but such modern relinquishments, if stated upon the record by special verdict, would in no instance warrant a judgment against any prescription. The principle of the difference is obvious and universal: the Court looking at a record can presume nothing; it has nothing to do with reasonable probabilities, but is to establish legal certainties by its judgments. Every crime is, like every other complex idea, capable of a legal definition: if all the component parts which go to its formation are put as facts upon the record, the Court can pronounce the perpetrator of them a criminal: but if any of them are wanting, it is a chasm in fact, and cannot be supplied. Wherever intention goes to the essence of the charge, it must be found by the Jury; it must be either comprehended under the word Guilty in the general verdict, or specifically found as a fact by the special verdict. This was solemnly decided by the Court in Huggins's case, in second Lord Raymond, 1581, which was a special verdict of murder from the Old Bailey.

It was an indictment against John Huggins and James Barnes, for the murder of Edward Arne. The indictment charged that Barnes made an assault upon Edward Arne, being in the custody of the other prisoner Huggins, and detained him for six weeks in a room newly built over the common sewer of the prison, where he languished and died: the indictment further charged, that Barnes and Hug-

gins well knew that the room was unwholesome and dangerous: the indictment then charged that the prisoner Huggins of his malice aforethought was present, aiding, and abetting Barnes, to commit the murder aforesaid. This was the substance of the indictment.

The special verdict found that Huggins was warden of the Fleet by letters patent: that the other prisoner Barnes was servant to Gibbons Huggins, deputy in the care of all the prisoners, and of the deceased a prisoner there. That the prisoner Barnes, on the 7th of September, put the deceased Arne in a room over the common sewer which had been newly built, knowing it to be newly built, and damp, and situated as laid in the indictment: *and that fifteen days before the prisoner's death,* HUGGINS *likewise well knew that the room was new built, damp, and situated as laid. They found that fifteen days before the death* of the prisoner, Huggins was present in the room, and saw him there under duress of imprisonment, *but then and there turned away, and Barnes locked the door, and that from that time till his death the deceased remained locked up.*

It was argued before the twelve Judges in Serjeants Inn, whether Huggins was guilty of murder. It was agreed that he was not answerable *criminally,* for the act of his deputy, and could not be guilty, unless the criminal intention was brought personally home to himself. And it is remarkable how strongly the Judges required the fact of knowledge and ma-

lice, to be stated on the face of the verdict, as opposed to *evidence* of intention, and inference from a fact.

The Court said, It is chiefly relied on that Huggins was present in the room, and saw Arne *sub duritie imprisonamenti, et se avertit*; but he might be present, and not know all the circumstances; the words are VIDIT *sub duritie*; but he might *see* him under duress, and not *know* he was under duress: it was answered, that seeing him under duress evidently means he knew he was under duress; but says the Court, "*We cannot take things by inference "in this manner: his seeing is but evidence of his know-"ledge of these things; and therefore the Jury, if the "fact would have borne it, should have found that "Huggins knew he was there without his consent; "which not being done, we cannot intend these things "nor infer them; we must judge of facts, and not "from the evidence of facts*;" and cited Kelynge, 78; that whether a man be aiding and abetting a murder is matter of fact, and ought to be expressly found by a Jury.

The application of these last principles and authorities to the case before the Court is obvious and simple.—The criminal intention is a fact, and must be found by the Jury: and that finding can only be expressed upon the record by the general verdict of Guilty which comprehends it, or by the special enumeration of such facts as do not merely amount to evidence of, but which completely and conclusively con-

stitute the crime. But it has been shown, and is indeed admitted, that the publication of a libel is only *primâ facie* evidence of the complex charge in the indictment, and not such a fact as amounts in itself, when specially stated, to conclusive guilt; since, as the Judges cannot tell how the criminal inference from the fact of publishing a libel, might have been rebutted at the trial; no judgment can follow from a special finding, that the Defendant published the paper indicted, according to the tenor laid in the indictment.—It follows from this, that if the Jury had only found the fact of publication, which was all that was left to them, *without affixing the epithet of Guilty*, which could only be legally affixed by an investigation not permitted to them; a *venire facias de novo* must have been awarded because of the uncertainty of the verdict as to the criminal intention: whereas it will now be argued, that if the Court shall hold the Dialogue to be a libel, the Defendant is fully convicted; because the verdict does not merely find that he PUBLISHED, which is a finding consistent with innocence, but finds him GUILTY of publishing, which is a finding of the criminal publication charged by the indictment.

My Lord, how I shall be able to defend my innocent Client against such an argument I am not prepared to say; I feel all the weight of it; but that feeling surely entitles me to greater attention, when I complain of that which subjects him to it, without the warrant of the law. It is the weight of such an

argument that entitles me to a new trial: for the Dean of St. Asaph is not only found guilty, without any investigation of his guilt by the Jury, but without that question being even open to your Lordships on the record. Upon the record the Court can only say the Dialogue is, or is not, a libel; but if it should pronounce it to be one, the criminal intention of the Defendant in publishing it is taken for granted by the word Guilty; although it has not only not been tried, but evidently appears from the verdict itself not to have been found by the Jury. Their verdict is, "Guilty of publishing; but whether a libel or "not, they do not find." And it is therefore impossible to say that they can have found a criminal motive in publishing a paper, on the criminality of which they have formed no judgment. Printing and publishing that which is legal, contains in it no crime;—the guilt must arise from the publication of a libel; and there is therefore a palpable repugnancy on the face of the verdict itself, which first finds the Dean guilty of publishing, and then renders the finding a nullity, by pronouncing ignorance in the Jury whether the thing published comprehends any guilt.

To conclude this part of the subject, the epithet of Guilty (as I set out with at first) must either be taken to be substance, or form. If it be substance, and, as such, conclusive of the *criminal* intention of the publisher, should the thing published be hereafter adjudged to be a libel, I ask a new trial, be-

cause the Defendant's guilt in that respect has been found without having been tried: if, on the other hand, the word GUILTY is admitted to be but a word of form, then let it be expunged, and I am not hurt by the verdict.

Having now established, according to my two first propositions, that the Jury upon every general issue, joined in a criminal case, have a constitutional jurisdiction over the whole charge, I am next, in support of my third, to contend, that the case of a libel forms no legal exception to the general principles which govern the trial of all other crimes;—that the argument for the difference, viz. because the whole charge always appears on the record, is false in fact, and that, even if true, it would form no substantial difference in law.

As to the first, I still maintain that the whole case does by no means necessarily appear on the record. The Crown may indict part of the publication, which may bear a criminal construction when separated from the context, and the context omitted having no place in the indictment, the Defendant can neither demur to it, nor arrest the judgment after a verdict of Guilty; because the Court is absolutely circumscribed by what appears on the record, and the record contains a legal charge of a libel.

I maintain likewise, that, according to the principles adopted upon this trial, he is equally shut out from such defence before the Jury; for though he

may read the explanatory context in evidence, yet he can derive no advantage from reading it, if they are tied down to find him guilty of publishing the matter which is contained in the indictment, however its innocence may be established by a view of the whole work. The only operation which looking at the context can have upon a Jury is, to convince them that the matter upon the record, however libellous when taken by itself, was not intended to convey the meaning which the words indicted import in language, when separated from the general scope of the writing: but upon the principle contended for, they could not acquit the Defendant upon any such opinion, for that would be to take upon them the prohibited question of libel, which is said to be matter of law for the Court.

My learned friend Mr. Bearcroft appealed to his audience with an air of triumph, whether any sober man could believe, that an English Jury, in the case I put from Algernon Sidney, would convict a Defendant of publishing the Bible, should the Crown indict a member of a verse which was blasphemous in itself if separated from the context. My Lord, if my friend had attended to me, he would have found, that, in considering such supposition as an absurdity, he was only repeating my own words. I never supposed that a Jury would act so wickedly or so absurdly, in a case where the principle contended for by my friend Mr. Bearcroft carried so palpable a face of injustice, as in the instance which I selected to ex-

pose it; and which I therefore selected to show, that there were cases in which the supporters of the doctrine were ashamed of it, and obliged to deny its operation: for it is impossible to deny that, if the Jury can look at the context in the case put by Sidney, and acquit the Defendant on the merits of the thing published, they may do it in cases which will directly operate against the principle he seems to support. This will appear from other instances, where the injustice is equal, but not equally striking.

Suppose the Crown were to select some passage from Locke upon Government; as for instance; "that there was no difference *between the King and* "*the Constable when either of them exceeded their* "*authority*." That assertion, under certain circumstances, if taken by itself without the context, might be highly seditious, and the question therefore would be *quo animo* it was written:—perhaps the real meaning of the sentence might not be discoverable by the immediate context without a view of the whole chapter,—perhaps of the whole book; therefore to do justice to the Defendant, upon the very principle by which Mr. Bearcroft in answering Sidney's case can alone acquit the publisher of his Bible, the Jury must look into the whole Essay on Government, and form a judgment of the design of the author, and the meaning of his work.

Lord Mansfield. To be sure they may judge from the whole work.

Mr. Erskine. And what is this, my Lord, but

determining the question of libel which is denied to-day? for if a Jury may acquit the publisher of any part of Mr. Locke on Government, from a judgment arising out of a view of the whole book, though there be no innuendos to be filled up as facts in the indictment,—what is it that bound the Jury to convict the Dean of St Asaph, as the publisher of Sir William Jones's Dialogue, on the bare fact of publication, without the right of saying that his observations as well as Mr. Locke's, were speculative, abstract, and legal?

Lord Mansfield. They certainly may in all cases go into the whole context.

Mr. Erskine. And why may they go into the context?—Clearly, my Lord, to enable them to form a correct judgment of the meaning of the part indicted, even though no particular meaning be submitted to them by averments in the indictment; and therefore the very permission to look at the context for such a purpose (where there are no innuendos to be filled up by them as facts), is a palpable admission of all I am contending for, viz. the right of the Jury to judge of the merits of the paper, and the intention of its author *.

But it is said, that though a Jury have a right to decide that a paper criminal as far as it appears on the record, is nevertheless legal when explained by the whole work of which it is a part; yet that they

* The right was fully exercised by the Jury who tried and acquitted Mr. Stockdale.

shall have no right to say that the whole work itself, if it happens to be all indicted, is innocent and legal. This proposition, my Lord, upon the bare stating of it, seems too preposterous to be seriously entertained; yet there is no alternative between maintaining it in its full extent, and abandoning the whole argument.

If the Defendant is indicted for publishing part of the verse in the Psalms, "There is no God," it is asserted that the Jury may look at the context, and seeing that the whole verse did not maintain that blasphemous proposition, but only that the fool had said so in his heart, may acquit the Defendant upon a judgment that it is no libel, to impute such imagination to a fool: but if the whole verse had been indicted, viz. "The fool has said in his heart, There "is no God;" the Jury, on the principle contended for, would be restrained from the same judgment of its legality, and must convict of blasphemy on the fact of publishing, leaving the question of libel untouched on the record.

If, in the same manner, only part of this very Dialogue had been indicted instead of the whole, it is said even by your Lordship, that the Jury might have read the context, and then, notwithstanding the fact of publishing, might have collected from the whole, its abstract and speculative nature, and have acquitted the Defendant upon that judgment of it;—and yet it is contended that they have no right to form the same judgment of it upon

present occasion, although the whole be before them upon the face of the indictment,—but are bound to convict the Defendant upon the fact of publishing, notwithstanding they should have come to the same judgment of its legality, which it is admitted they might have come to, on trying an indictment for the publication of a part. Really, my Lord, the absurdities and gross departures from reason, which must be hazarded to support this doctrine, are endless.

The criminality of the paper is said to be a question of law, yet the meaning of it, from which alone the legal interpretation can arise, is admitted to be a question of fact. If the text be so perplexed and dubious as to require innuendos to explain, to point and to apply obscure expression or construction, the Jury alone, as judges of fact, are to interpret and to say what sentiments the author must have meant to convey by his writing :—yet if the writing be so plain and intelligible as to require no averments of its meaning, it then becomes so obscure and mysterious as to be a question of law, and beyond the reach of the very same men who but a moment before were interpreters for the Judges ; and though its object be most obviously peaceable and its author innocent, they are bound to say upon their oaths, that it is wicked and seditious, and the publisher of it guilty.

As a question of fact the Jury are to try the real sense and construction of the words indicted, by comparing them with the context ; and yet if that context itself, which affords the comparison, makes

part of the indictment, the whole becomes a question of law, and they are then bound down to convict the Defendant on the fact of publishing it, without any jurisdiction over the meaning. To complete the juggle, the intention of the publisher may likewise be shown as a fact, by the evidence of any extrinsic circumstances, such as the context to explain the writing, or the circumstances of mistake or ignorance under which it was published; and yet in the same breath, the intention is pronounced to be an inference of law from the act of publication, which the Jury cannot exclude, but which must depend upon the future judgment of the Court.

But the danger of this system is no less obvious than its absurdity. I do not believe that its authors ever thought of inflicting death upon Englishmen, without the interposition of a Jury; yet its establishment would unquestionably extend to annihilate the substance of that trial in every prosecution for high treason, where the publication of any writing was laid as the overt act. I illustrated this by a case when I moved for a rule, and called upon my friends for an answer to it, but no notice has been taken of it by any of them;—this was just what I expected:—when a convincing answer cannot be found to an objection, those who understand controversy never give strength to it by a weak one.

I said, and I again repeat, that if an indictment charges that a Defendant did traitorously intend, compass, and imagine the death of the King; and,

in order to carry such treason into execution, published a paper, which it sets out literatim on the face of the record, the principle which is laid down to-day would subject that person to the pains of death by the single authority of the Judges, without leaving any thing to the Jury, but the bare fact of publishing the paper. For, if that fact were proved and the Defendant called no witnesses, the Judge who tried him would be warranted, nay bound in duty by the principle in question, to say to the Jury, Gentlemen, the overt act of treason charged upon the Defendant, is the publication of this paper, intending to compass the death of the King;—the fact is proved, and you are therefore bound to convict him: the treasonable intention is an inference of law from the act of publishing; and if the thing published does not upon a future examination intrinsically support that inference, the Court will arrest the judgment, and your verdict will not affect the prisoner.

My Lord, I will rest my whole argument upon the analogy between these two cases, and give up every objection to the doctrine when applied to the one, if, upon the strictest examination, it shall not be found to apply equally to the other.

If the seditious intention be an inference of law, from the fact of publishing the paper which this indictment charges to be a libel,—is not the treasonable intention equally an inference from the fact of publishing that paper, which the other indictment

charges to be an overt act of treason? In the one case as in the other, the writing or publication of a paper is the whole charge; and the substance of the paper so written or published makes all the difference between the two offences.—If that substance be matter of law where it is a seditious libel, it must be matter of law where it is an act of treason: and if because it is law the Jury are excluded from judging it in the one instance, their judgment must suffer an equal abridgment in the other.

The consequence is obvious. If the Jury, by an appeal to their consciences, are to be thus limited in the free exercise of that right which was given them by the constitution, to be a protection against judicial authority, where the weight and majesty of the Crown is put into the scale against an obscure individual,—the freedom of the press is at an end: for how can it be said that the press is free because every thing may be published without a previous license, if the publisher of the most meritorious work which the united powers of genius and patriotism ever gave to the world, may be prosecuted by information of the King's Attorney General, without the consent of the Grand Jury,—may be convicted by the Petty Jury, on the mere fact of publishing (who indeed, without perjuring themselves, must on this system inevitably convict him), and must then depend upon Judges, who may be the supporters of the very Administration whose measures are questioned by the Defendant, and who must therefore either give judgment against him or against themselves.

To all this Mr. Bearcroft shortly answers, Are you not in the hands of the same Judges, with repect to your property and even to your life, when special verdicts are found in murder, felony, and treason? In these cases do prisoners run any hazard from the application of the law by the Judges, to the facts found by the Juries? Where can you possibly be safer?

My Lord, this is an argument which I can answer without indelicacy or offence, because your Lordship's mind is much too liberal to suppose, that I insult the Court by general observations on the principles of our legal government:—however safe we might be, or might think ourselves, the constitution never intended to invest Judges with a discretion, which cannot be tried and measured by the plain and palpable standard of law; and in all the cases put by Mr. Bearcroft, no such loose discretion is exercised as must be entertained by a judgment on a seditious libel, and therefore the cases are not parallel.

On a special verdict for murder, the life of the prisoner does not depend upon the religious, moral, or philosophical ideas of the Judges, concerning the nature of homicide:—no; precedents are searched for, and if he is condemned at all, he is judged exactly by the same rule as others have been judged by before him; his conduct is brought to a precise, clear, intelligible standard, and cautiously measured by it: it is the law therefore, and not the Judge,

which condemns him. It is the same in all indictments, or civil actions, for slander upon individuals.

Reputation is a personal right of the subject, indeed the most valuable of any, and it is therefore secured by law, and all injuries to it clearly ascertained: whatever slander hurts a man in his trade,—subjects him to danger of life, liberty, or loss of property,—or tends to render him infamous, is the subject of an action, and in some instances of an indictment. But in all these cases, where the *malus animus* is found by the Jury, the Judges are in like manner a safe repository of the legal consequence; because such libels may be brought to a well-known standard of strict and positive law:—they leave no discretion in the Judges:—the determination of what words, when written or spoken of another, are actionable, or the subject of an indictment, leaves no more latitude to a Court sitting in judgment on the record, than a question of title does in a special verdict in ejectment.

But I beseech your Lordship to consider, by what rule the legality or illegality of this Dialogue is to be decided by the Court as a question of law upon the record. Mr. Bearcroft has admitted in the most unequivocal terms (what indeed it was impossible for him to deny), that every part of it, when viewed in the abstract, was legal; but he says, there is a great distinction to be taken between speculation and exhortation, and that it is this latter which makes it a libel. I readily accede to the truth of the observation; but how your Lordship is to determine

that difference as a question of law, is past my comprehension :—for if the Dialogue in its phrase and composition be general, and its libellous tendency arises from the purpose of the writer, to raise discontent by a seditious application of legal doctrines,—that purpose is surely a question of fact if ever there was one, and must therefore be distinctly averred in the indictment, to give the cognizance of it as a fact to the Jury, without which no libel can possibly appear upon the record : this is well known to be the only office of the innuendo ; because the Judges can presume nothing, which the strictest rules of grammar do not warrant them to collect intrinsically from the writing itself.

Circumscribed by the record, your Lordship can form no judgment of the tendency of this Dialogue to excite sedition by any thing but the mere words :—you must look at it as if it was an old manuscript dug out of the ruins of Herculaneum ;—you can collect nothing from the time when, or the circumstances under which it was published ;—the person by whom, and those amongst whom it was circulated ; yet these may render a paper at one time, and under some circumstances, dangerously wicked and seditious, which at another time, and under different circumstances, might be innocent and highly meritorious. If puzzled by a task so inconsistent with the real sense and spirit of judicature, your Lordships should spurn the fetters of the record, and, judging with the reason rather than the infirmities

of men, should take into your consideration the state of men's minds on the subject of equal representation at this moment, and the great disposition of the present times to revolution in government :— if, reading the record with these impressions, your Lordships should be led to a judgment not warranted by an abstract consideration of the record, then, besides that such a judgment would be founded on facts not in evidence before the Court, and not within its jurisdiction if they were,—let me further remind your Lordships, that even if those objections to the premises were removed, the conclusion would be no conclusion of law: your decision on the subject might be very sagacious as politicians, as moralists, as philosophers, or as licensers of the press, but they would have no resemblance to the judgments of an English Court of justice, because it could have no warrant from the act of your predecessors, nor afford any precedent to your successors.

But all these objections are perfectly removed, when the seditious tendency of a paper is considered as a question of fact: we are then relieved from the absurdity of legal discussion separated from all the facts from which alone the law can arise; for the Jury can do what (as I observed before) your Lordships cannot do in judging by the record;—they can examine by evidence all those circumstances that tend to establish the seditious tendency of the paper, from which the Court is shut out:—they may know themselves, or it may be proved before them, that it has

excited sedition already:—they may collect from witnesses that it has been widely circulated, and seditiously understood; or, if the prosecution (as is wisest) precedes these consequences, and the reasoning must be *à priori*, surely gentlemen living in the country are much better judges than your Lordship, what has or has not a tendency to disturb the neighbourhood in which they live, and that very neighbourhood is the forum of criminal trial.

If they know that the subject of the paper is the topic that agitates the country around them;—if they see danger in that agitation, and have reason to think that the publisher must have intended it; they say he is guilty. If, on the other hand, they consider the paper to be legal, and enlightened in principle;—likely to promote a spirit of activity and liberty in times when the activity of such a spirit is essential to the public safety, and have reason to believe it to be written and published in that spirit, they say, as they ought to do, that the writer or the publisher is not guilty. Whereas your Lordships' judgment upon the language of the record must ever be in the pure abstract;—operating blindly and indiscriminately upon all times, circumstances, and intentions;—making no distinction between the glorious attempts of a Sidney or a Russel, struggling against the terrors of despotism under the Stuarts, and those desperate adventurers of the year forty-five, who libelled the person, and excited rebellion

against the mild and gracious government, of our late excellent sovereign King George the Second.

My Lord, if the independent gentlemen of England are thus better qualified to decide from cause of knowledge, it is no offence to the Court to say, that they are full as likely to decide with impartial justice as Judges appointed by the Crown. Your Lordships have but a life interest in the public property, but they have an inheritance in it for their children. Their landed property depends upon the security of the government, and no man who wantonly attacks it can hope or expect to escape from the selfish lenity of a Jury. On the first principles of human action they must lean heavily against him. It is only when the pride of Englishmen is insulted by such doctrines as I am opposing to-day, that they may be betrayed into a verdict delivering the guilty, rather than surrender the rights by which alone innocence in the day of danger can be protected.

I venture therefore to say, in support of one of my original propositions, that where a writing indicted as a libel, neither contains, nor is averred by the indictment to contain, any slander of an individual, so as to fall within those rules of law which protect personal reputation, but whose criminality is charged to consist (as in the present instance) in its tendency to stir up general discontent, that the trial of such an indictment neither involves, nor can in its obvious nature involve, any abstract question of

law for the judgment of a Court, but must wholly depend upon the judgment of the Jury on the tendency of the writing itself, to produce such consequences, when connected with all the circumstances which attended its publication.

It is unnecessary to push this part of the argument further, because I have heard nothing from the Bar against the position which it maintains; none of the gentlemen have, to my recollection, given the Court any one single reason, good or bad, why the *tendency* of a paper to stir up discontent against Government, separated from all the circumstances which are ever shut out from the record, ought to be considered as an abstract question of law: they have not told us where we are to find any matter in the books to enable us to argue such questions before the Court; or where your Lordships yourselves are to find a rule for your judgments on such subjects. I confess that to me it looks more like legislation, or arbitrary power, than English judicature. If the Court can say, this is a criminal writing, *not* because we know that mischief was intended by its author, or is even contained in itself, but because fools believing the one and the other may do mischief in their folly; the suppression of such writings under particular circumstances may be wise policy in a state, but upon what principle it can be criminal law in England to be settled in the abstract by Judges, I confess with humility, that I have no organs to understand.

Mr. Leycester felt the difficulty of maintaining such a proposition by any argument of law, and therefore had recourse to an argument of fact. "If," says my learned friend, "what is or is not a seditious libel, be not a question of law for the Court, "but of fact for the Jury, upon what principle do "Defendants found guilty of such libels by a general "verdict, defeat the judgment for error on the "record: and what is still more in point, upon "what principle does Mr. Erskine himself, if he "fails in his present motion, mean to ask your "Lordships to arrest this very judgment by saying "that the Dialogue is not a libel?"

My Lord, the observation is very ingenious, and God knows the argument requires that it should;—but it is nothing more. The arrest of judgment which follows after a verdict of Guilty for publishing a writing, which on inspection of the record exhibits to the Court no specific offence against the law, is no impeachment of my doctrine. I never denied such a jurisdiction to the Court. My position is, that no man shall be punished for the criminal breach of any law, until a Jury of his equals have pronounced him guilty in mind as well as in act. *Actus non facit reum nisi mens sit rea.*

But I never asserted that a Jury had the power to make criminal law as well as to administer it; and therefore it is clear that they cannot deliver over a man to punishment if it appears by the record of his accusation, which it is the office of judicature to ex-

amine, that he has not offended against any positive law; because, however criminal he may have been in his disposition, which is a fact established by the verdict, yet statute and precedents can alone decide what is by law an *indictable* offence.

If, for instance, a man were charged by an indictment with having held a discourse in words highly seditious, and were found guilty by the Jury, it is evident that it is the province of the Court to arrest that judgment; because though the Jury have found that he spoke the words as laid in the indictment, with the seditious intention charged upon him, which they, and they only, could find; yet as the words are not punishable by indictment, as when committed to writing, the Court could not pronounce judgment: the declaration of the Jury, that the Defendant was guilty in manner and form as accused, could evidently never warrant a judgment, if the accusation itself contained no charge of an offence against the law.

In the same manner, if a butcher were indicted for privately putting a sheep to causeless and unnecessary torture in the exercise of his trade, but not in public view, so as to be productive of evil example, and the Jury should find him guilty, I am afraid that no judgment could follow; because, though done *malo animo*, yet neither statute nor precedent have perhaps determined it to be an indictable offence;—it would be difficult to draw the line. An indictment would not lie for every inhuman neglect of the suffer-

ings of the smallest innocent animals which Providence has subjected to us.

> "Yet the poor beetle which we tread upon,
> In corporal suffering feels a pang as great
> As when a giant dies."

A thousand other instances might be brought of acts base and immoral, and prejudicial in their consequences, which are not yet indictable by law.

In the case of the King against Brewer, in Cowper's Reports, it was held that *knowingly* exposing to sale and selling gold under sterling for standard gold, is not indictable; because the act refers to goldsmiths only, and private cheating is not a common-law offence. Here too the declaration of the Jury that the Defendant is guilty in manner and form as accused, does not change the nature of the accusation: the verdict does not go beyond the charge; and if the charge be invalid in law, the verdict must be invalid also. All these cases therefore, and many similar ones which might be put, are clearly consistent with my principle; I do not seek to erect jurors into legislators or judges: there must be a rule of action in every society which it is the duty of the legislature to create, and of judicature to expound when created. I only support their right to determine guilt or innocence where the crime charged is blended by the general issue with the intention of the criminal; more especially when the quality of the act itself, even independent of that intention, is

not measurable by any precise principle or precedent of law, but is inseparably connected with the time when, the place where, and the circumstances under which, the Defendant acted.

My Lord, in considering libels of this nature as opposed to slander on individuals to be mere questions of fact, or at all events to contain matter fit for the determination of the Jury; I am supported not only by the general practice of Courts, but even of those very practisers themselves, who in prosecuting for the Crown have maintained the contrary doctrine.

Your Lordships will, I am persuaded, admit that the general practice of the profession, more especially of the very heads of it, prosecuting too for the public, is strong evidence of the law. Attorney Generals have seldom entertained such a jealousy of the King's Judges in state prosecutions, as to lead them to make presents of jurisdiction to Juries, which did not belong to them of right by the constitution of the country. Neither can it be supposed, that men in high office and of great experience, should in every instance, though differing from each other in temper, character, and talents, uniformly fall into the same absurdity of declaiming to Juries upon topics totally irrelevant, when no such inconsistency is found to disfigure the professional conduct of the same men in other cases. Yet I may appeal to your Lordships' recollection, without having recourse to the state trials, whether upon

every prosecution for a seditious libel within living memory, the Attorney General has not uniformly stated such writings at length to the Jury, pointed out their seditious tendency which rendered them criminal, and exerted all his powers to convince them of their illegality, as the very point on which their verdict for the Crown was to be founded.

On the trial of Mr. Horne, for publishing an advertisement in favour of the widows of those American subjects who had been *murdered* by the King's troops at Lexington; did the present Chancellor, then Attorney General, content himself with saying that he had proved the publication, and that the criminal quality of the paper which raised the legal inference of guilt against the Defendant, was matter for the Court? No, my Lord; he went at great length into its dangerous and pernicious tendency, and applied himself with skill and ability to the understandings and the consciences of the Jurors. This instance is in itself decisive of his opinion: that great magistrate could not have acted thus upon the principle contended for to-day:—he never was an idle declaimer;—close and masculine argument is the characteristic of his understanding.

The character and talents of the late Lord Chief Justice De Grey, no less entitle me to infer his opinion from his uniform conduct. In all such prosecutions while he was in office, he held the same language to Juries; and particularly in the case of the King against Woodfall, *to use the expression of a ce-*

lebrated writer on the occasion, " he tortured his fa-
" culties for more than two hours, to convince them
" that Junius's letter was a libel."

The opinions of another Crown lawyer, who has since passed through the first offices of the law, and filled them with the highest reputation, I am not driven to collect alone from his language as an Attorney General; because he carried them with him to the seat of justice. Yet one case is too remarkable to be omitted.

Lord Camden prosecuting Doctor Shebbeare, told the Jury that he did not desire their verdict upon any other principle, than their solemn conviction of the truth of the information, which charged the Defendant with a wicked design, to alienate the hearts of the subjects of this country from their King upon the throne.

To complete the account: my learned friend Mr. Bearcroft, though last not least in favour, upon this very occasion, spoke above an hour to the Jury at Shrewsbury, to convince them of the libellous tendency of the Dialogue, which soon afterwards the learned Judge desired them wholly to dismiss from their consideration, as matter with which they had no concern. The real fact is, that the doctrine is too absurd to be acted upon;—too distorted in principle, to admit of consistency in practice:—it is contraband in law, and can only be smuggled by those who introduce it:—it requires great talents and great address

to hide its deformity :—in vulgar hands it becomes contemptible.

Having supported the rights of Juries, by the uniform practice of Crown lawyers, let us now examine the question of authority, and see how this Court itself, and its Judges, have acted upon trials for libels in former times; for, according to Lord Raymond, in Franklin's case (as cited by Mr. Justice Buller, at Shrewsbury), the principle I am supporting, had, it seems, been only broached about the year 1731, by some men of party spirit, and then too for the very first time.

My Lord, such an observation in the mouth of Lord Raymond, proves how dangerous it is to take up as doctrine every thing flung out at *Nisi Prius*; above all, upon subjects which engage the passions and interests of Government. The most solemn and important trials with which history makes us acquainted, discussed too at the bar of this Court, when filled with Judges the most devoted to the Crown, afford the most decisive contradiction to such an unfounded and unguarded assertion.

In the famous case of the seven Bishops, the question of libel or no libel was held unanimously by the Court of King's Bench trying the cause at the bar, to be matter for the consideration and determination of the Jury; and the Bishops' petition to the King, which was the subject of the information, was accordingly delivered to them, when they withdrew to consider of their verdict.

Thinking this case decisive, I cited it at the trial, and the answer it received from Mr. Bearcroft was, that it had no relation to the point in dispute between us, for that the Bishops were acquitted not upon the question of libel, but because the delivery of the petition to the King was held to be no publication.

I was not a little surprised at this statement, but my turn of speaking was then past; fortunately today it is my privilege to speak last, and I have now lying before me the fifth volume of the State Trials, where the case of the Bishops is printed, and where it appears that the publication was expressly proved, —that nothing turned upon it in the judgment of the Court,—and that the Charge turned wholly upon the question of libel, which was expressly left to the Jury by every one of the Judges. Lord Chief Justice Wright, in summing up the evidence, told them that a question had at first arisen about the publication, it being insisted on, that the delivery of the petition to the King had not been proved; that the Court was of the same opinion, and that he was just going to have directed them to find the Bishops not guilty, when in came my Lord President (such sort of witnesses were no doubt always at hand when wanted), who proved the delivery to His Majesty. "Therefore," continued the Chief Justice, "if you "believe it was the same petition, it is a publication "sufficient, and we must therefore come to inquire "whether it be a libel."

He then gave his reasons for thinking it within the case *de libellis famosis*, and concluded by saying to the Jury, "In short, I must give you my "opinion: I do take it to be a libel; if my brothers "have any thing to say to it, I suppose they will "deliver their opinion." What opinion?—not that the Jury had no jurisdiction to judge of the matter, but an opinion for the express purpose of enabling them to give that judgment, which the law required at their hands.

Mr. Justice Holloway then followed the Chief Justice; and so pointedly was the question of libel or no libel, and not the publication, the only matter which remained in doubt, and which the Jury, with the assistance of the Court, were to decide upon; that when the learned Judge went into the facts which had been in evidence, the Chief Justice said to him, "Look you; by the way, brother, I did not "ask you to sum up the evidence, but only to de-"liver your opinion to the Jury, whether it be a "libel or no." The Chief Justice's remark, though it proves my position, was, however, very unnecessary; for but a moment before, Mr. Justice Holloway had declared he did not think it was a libel, but addressing himself to the Jury had said, "*It is left "to you, gentlemen.*"

Mr. Justice Powell, who likewise gave his opinion that it was no libel, said *to the Jury*, "*But the "matter of it is before you, and I leave the issue of "it to God and your own consciences:*" and so little

was it in idea of any one of the Court, that the Jury ought to found their verdict solely upon the evidence of the publication, without attending to the criminality or innocence of the petition ;—that the Chief Justice himself consented, on their withdrawing from the bar, that they should carry with them all the materials for coming to a judgment as comprehensive as the charge ; and indeed expressly directed that the information,—the libel,—the declarations under the great seal,—and even the statute-book, should be delivered to them.

The happy issue of this memorable trial, in the acquittal of the Bishops by the Jury, exercising jurisdiction over the whole charge, freely admitted to them as legal even by King James's Judges, is admitted by two of the gentlemen to have prepared and forwarded the glorious æra of the Revolution. Mr. Bower, in particular, spoke with singular enthusiasm concerning this verdict, choosing (for reasons sufficiently obvious) to ascribe it to a special miracle wrought for the safety of the nation, rather than to the right lodged in the Jury to save it by its laws and constitution.

My learned friend, finding his argument like nothing upon the earth, was obliged to ascend into heaven to support it : —having admitted that the Jury not only acted like just men towards the Bishops, but as patriot citizens towards their country, and not being able, without the surrender of his whole argument, to allow either their public spirit

or their private justice to have been consonant to the laws, he is driven to make them the instruments of divine Providence to bring good out of evil, and holds them up as men inspired by God to perjure themselves in the administration of justice, in order, by the by, to defeat the effects of that wretched system of judicature, which he is defending to-day as the constitution of England. For if the King's Judges could have decided the petition to be a libel, the Stuarts might yet have been on the throne.

My Lord, this is an argument of a priest, not of a lawyer: and even if faith and not law were to govern the question, I should be as far from subscribing to it as a religious opinion.

No man believes more firmly than I do that God governs the whole universe by the gracious dispensations of his providence, and that all the nations of the earth rise and fall at his command: but then this wonderful system is carried on by the natural, though to us the often hidden, relation between effects and causes, which wisdom adjusted from the beginning, and which foreknowledge at the same time rendered sufficient, without disturbing either the laws of nature or of civil society.

The prosperitiy and greatness of empires ever depended, and ever must depend, upon the use their inhabitants make of their reason in devising wise laws, and the spirit and virtue with which they watch over their just execution: and it is impious to suppose, that men, who have made no provision for

their own happiness or security in their attention to their government, are to be saved by the interposition of Heaven in turning the hearts of their tyrants to protect them.

But if every case in which Judges have left the question of libel to Juries in opposition to law, is to be considered as a miracle, England may vie with Palestine; and Lord Chief Justice Holt steps next into view as an apostle; for that great Judge, in Tutchin's case, left the question of libel to the Jury in the most unambiguous terms:—after summing up the evidence of writing and publishing, he said to them as follows:

"You have now heard the evidence, and you are "to consider whether Mr. Tutchin be guilty. "They say they are innocent papers, and no libels; "and they say nothing is a libel but what reflects "upon some particular person. But this is a very "strange doctrine, to say, it is not a libel reflecting on the government, endeavouring to possess "the people that the government is male-administered by corrupt persons, that are employed in "such or such stations either in the navy or army.

"To say that corrupt officers are appointed to "administer affairs, is certainly a reflection on the "government. If people should not be called to "account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments "that the people should have a good opinion of it:

" and nothing can be worse to any government,
" than to endeavour to procure animosities, as to
" the management of it; this has been always looked
" upon as a crime, and no government can be safe
" without it be punished."

Having made these observations, did the Chief Justice tell the Jury, that whether the publication in question fell within that principle so as to be a libel on government, was a matter of law for the Court, with which they had no concern?—Quite the contrary: he considered the seditious tendency of the paper as a question for their sole determination, saying to them,

" Now you are to consider, whether these words
" I have read to you, do not tend to beget an ill
" opinion of the administration of the government:
" to tell us, that those that are employed know
" nothing of the matter, and those that do know
" are not employed. Men are not adapted to of-
" fices, but offices to men, out of a particular re-
" gard to their interest, and not to their fitness for
" the places. This is the purport of these papers."

In citing the words of Judges in judicature I have a right to suppose their discourse to be pertinent and relevant, and that when they state the Defendant's answer to the charge, and make remarks on it, they mean that the Jury should exercise a judgment under their direction: this is the practice we must certainly impute to Lord Holt, if we do him the justice to suppose that he meant to convey

the sentiments which he expressed. So that when we come to sum up this case, I do not find myself so far behind the learned gentleman even in point of express authority; putting all reason, and the analogies of law which unite to support me, wholly out of the question.

There is Court of King's Bench against Court of King's Bench;—Chief Justice Wright against Chief Justice Lee;—and Lord Holt against Lord Raymond: as to living authorities, it would be invidious to class them; but it is a point on which I am satisfied myself, and on which the world will be satisfied likewise if ever it comes to be a question.

But even if I should be mistaken in that particular, I cannot consent implicitly to receive any doctrine as the law of England, though pronounced to be such by magistrates the most respectable, if I find it to be in direct violation of the very first principles of English judicature. The great jurisdictions of the country are unalterable except by Parliament, and, until they are changed by that authority, they ought to remain sacred;—the Judges have no power over them. What parliamentary abridgment has been made upon the rights of Juries since the trial of the Bishops, or since Tutchin's case, when they were fully recognised by this Court?—None. Lord Raymond and Lord Chief Justice Lee ought therefore to have looked there—to their predecessors—for the law, instead of setting up a new one for their successors.

But supposing the Court should deny the legality of all these propositions, or, admitting their legality, should resist the conclusions I have drawn from them; then I have recourse to my last proposition, in which I am supported even by all those authorities, on which the learned Judge relies for the doctrines contained in his Charge; to wit,

"That in all cases where the mischievous intention, which is agreed to be the essence of the "crime, cannot be collected by simple inference "from the fact charged, because the Defendant goes "into evidence to rebut such inference, the intention becomes then a pure unmixed question of fact, "for the consideration of the Jury."

I said the authorities of the King against Woodfall and Almon were with me. In the first, which is reported in 5th Burrow, your Lordship expressed yourself thus: "Where an act, in itself indifferent, "becomes criminal when done with a particular "intent, there the intent must be proved and "found. But where the act is itself unlawful, as "in the case of a libel, the PROOF of justification "or excuse lies on the Defendant; *and in failure "thereof, the law implies a criminal intent.*" Most luminously expressed to convey this sentiment, viz. that when a man publishes a libel, and has nothing to say for himself,—no explanation or exculpation,—a criminal intention need not be proved:—I freely admit that it need not;—it is an inference of common sense, not of law. But the publication of a

libel, does not exclusively show criminal intent, but is only an implication of law, in failure of the Defendant's proof. Your Lordship immediately afterwards in the same case explained this further. "There may be cases where the publication may be "justified or excused as lawful OR INNOCENT; FOR "NO FACT WHICH IS NOT CRIMINAL, "*though the paper* BE A LIBEL, can amount to SUCH "a publication of which a Defendant ought to be "found guilty." But no question of that kind arose at the trial (*i.e.* on the trial of Woodfall).—Why?—Your Lordship immediately explained why—"*Be-*"*cause the Defendant called no witnesses*;" expressly saying, that the publication of a libel is not in itself a crime, unless the intent be criminal; and that it is not merely in mitigation of punishment, but that *such* a publication does not warrant a verdict of Guilty.

In the case of the King against Almon, a magazine containing one of Junius's letters, was sold at Almon's shop;—there was proof of that sale at the trial. Mr. Almon called no witnesses, and was found guilty. To found a motion for a new trial, an affidavit was offered from Mr. Almon, that he was not privy to the sale, nor knew his name was inserted as a publisher; and that this practice of booksellers being inserted as publishers by their correspondents without notice, was common in the trade.

Your Lordship said, "Sale of a book in a book-

" seller's shop, is *primâ facie* evidence of publica-
" tion by the master, and the publication of a libel
" is *primâ facie* evidence of criminal intent: it
" stands good till answered by the Defendant: it
" must stand till contradicted or explained; *and if*
" *not contradicted, explained, or exculpated,* BE-
" COMES *tantamount to conclusive, when the Defendant*
" *calls no witnesses.*"

Mr. Justice Aston said, " *Primâ facie* evidence
" *not answered* is sufficient to ground a verdict
" upon: if the Defendant had a sufficient excuse,
" he might have proved it at the trial: his having
" neglected it where there was no surprise, is no
" ground for a new one." Mr. Justice Willes and Mr. Justice Ashhurst agreed upon those express principles.

These cases declare the law beyond all controversy to be, that publication, even of a libel, is no conclusive proof of guilt, but only *primâ facie* evidence of it till answered; and that if the Defendant can show that his intention was not criminal, he completely rebuts the inference arising from the publication; because, though it remains true, that he published, yet, according to your Lordship's express words, it is not such a publication of which a Defendant ought to be found guilty. Apply Mr. Justice Buller's summing up, to this law, and it does not require even a legal apprehension to distinguish the repugnancy.

The advertisement was proved to convince the

Jury of the Dean's motive for publishing;—Mr. Jones's testimony went strongly to aid it;—and the evidence to character, though not sufficient in itself, was admissible to be thrown into the scale. But not only no part of this was left to the Jury, but the whole of it was expressly removed from their consideration, although, in the cases of Woodfall and Almon, it was as expressly laid down to be within their cognizance, and a complete answer to the charge if satisfactory to the minds of the Jurors.

In support of the learned Judge's Charge, there can be therefore but the two arguments, which I stated on moving for the rule:—either that the Defendant's evidence, namely, the advertisement;—Mr. Jones's evidence in confirmation of its being *bonâ fide*;—and the evidence to character, to strengthen that construction, were not sufficient proof that the Dean believed the publication meritorious, and published it in vindication of his honest intentions:—or else, that, even admitting it to establish that fact, it did not amount to such an exculpation as to be evidence on Not guilty, so as to warrant a verdict.—I still give the learned Judge the choice of the alternative.

As to the first, viz. whether it showed honest intention in point of fact: that was a question for the Jury. If the learned Judge had thought it was not sufficient evidence to warrant the Jury's believing that the Dean's motives were such as he had de-

clared them; I conceive he should have given his opinion of it as a point of evidence, and left it there. I cannot condescend to go further; it would be ridiculous to argue a self-evident proposition.

As to the second, viz. that even if the Jury had believed from the evidence, that the Dean's intention was wholly innocent, it would not have warranted them in acquitting, and therefore should not have been left to them upon Not guilty;—that argument can never be supported. For, if the Jury had declared, "We find that the Dean published this "pamphlet, whether a libel or not we do not find: "and we find further, that, believing it in his "conscience to be meritorious and innocent, he, "*bonâ fide*, published it with the prefixed advertise-"ment, as a vindication of his character from the "reproach of seditious intentions, and not to excite "sedition:" it is impossible to say, without ridicule, that on such a special verdict the Court could have pronounced a criminal judgment.

Then why was the consideration of that evidence, by which those facts might have been found, withdrawn from the Jury, after they brought in a verdict guilty of publishing ONLY, which, in the King against Woodfall, was only said not to negative the criminal intention, because the Defendant called no witnesses?—Why did the learned Judge confine his inquiries to the innuendos, and finding them agreed to, direct the epithet of Guilty, without asking the Jury if they believed the Defendant's evidence to rebut

the criminal inference? Some of them positively meant to negative the criminal inference, by adding the word *only*, and all would have done it, if they had thought themselves at liberty to enter upon that evidence. But they were told expressly that they had nothing to do with the consideration of that evidence, which, if believed, would have warranted that verdict. The conclusion is evident;—if they had a right to consider it, and their consideration might have produced such a verdict, and if such a verdict would have been an acquittal, it must be a misdirection.

" But," says Mr. Bower, " if this advertisement, " prefixed to the publication, by which the Dean " professed his innocent intention in publishing it, " should have been left to the Jury as evidence of " that intention, to found an acquittal on, even " taking the Dialogue to be a libel; no man could " ever be convicted of publishing any thing, how- " ever dangerous: for he would only have to tack " an advertisement to it by way of preface, pro- " fessing the excellence of its principles and the sin- " cerity of his motives, and his defence would be " complete."

My Lord, I never contended for any such position. If a man of education, like the Dean, were to publish a writing so palpably libellous, that no ignorance or misapprehension imputable to such a person could prevent his discovering the mischievous design of the author; no Jury would believe such an

advertisement to be *bonâ fide*, and would therefore be bound in conscience to reject it, as if it had no existence: the effect of such evidence must be to convince the Jury of the Defendant's purity of mind, and must therefore depend upon the nature of the writing itself, and all the circumstances attending its publication.

If, upon reading the paper and considering the whole of the evidence, they have reason to think that the Defendant did not believe it to be illegal, and did not publish it with the seditious purpose charged by the indictment;—he is not guilty upon any principle or authority of law, and would have been acquitted even in the Star-chamber: for it was held by that Court in Lambe's case, in the eighth year of King James the First, as reported by Lord Coke, who then presided in it, that every one who should be convicted of a libel, must be the writer or contriver, or a *malicious* publisher, *knowing* it to be a libel.

This case of Lambe being of too high authority to be opposed, and too much in point to be passed over; Mr. Bower endeavours to avoid its force by giving it a new construction of his own: he says, that not knowing a writing to be a libel, in the sense of that case, means, not knowing the contents of the thing published; as by conveying papers sealed up, or having a sermon and a libel, and delivering one by mistake for the other. In such cases he says, *ignorantia facti excusat*, because the mind

does not go with the act; *sed ignorantia legis non excusat*; and therefore if the party knows the contents of the paper which he publishes, his mind goes with the act of publication, though he does not find out any thing criminal, and he is bound to abide by the legal consequences.

This is to make criminality depend upon the consciousness of an act, and not upon the knowledge of its quality, which would involve lunatics and children in all the penalties of criminal law:—for whatever they do is attended with consciousness, though their understanding does not reach to the consciousness of offence.

The publication of a libel, not believing it to be one after having read it, is a much more favourable case than publishing it unread by mistake; the one, nine times in ten, is a culpable negligence which is no excuse at all; for a man cannot throw papers about the world without reading them, and afterwards say he did not know their contents were criminal: but if a man reads a paper, and not believing it to contain any thing seditious, having collected nothing of that tendency himself,—publishes it among his neighbours as an innocent and useful work, he cannot be convicted as a criminal publisher. How he is to convince the Jury that his purpose was innocent, though the thing published be a libel, must depend upon circumstances; and these circumstances he may, on the authority of all the cases ancient and modern, lay before the Jury in evidence; because if he can

establish the innocence of his mind, he negatives the very gist of the indictment.

" In all crimes," says Lord Hale in his Pleas of the Crown, " the intention is the principal considera-
" tion: it is the mind that makes the taking of
" another's goods to be felony, or a bare trespass
" only: it is impossible to prescribe all the circum-
" stances evidencing a felonious intent, or the con-
" trary; but the same must be left to the attentive
" consideration of Judge *and Jury*; wherein the
" best rule is, *in dubiis*, rather to incline to acquittal
" than conviction."

In the same work he says, " By the statute of
" Philip and Mary, touching importation of coin
" counterfeit of foreign money, it must, to make it
" treason, be with the intent to utter and make
" payment of the same; and the intent in this case
" may be tried and found by circumstances of FACT,
" by words, letters, and a thousand evidences be-
" sides the bare doing of the fact."

This principle is illustrated by frequent practice, where the intention is found by the Jury as a fact in a special verdict. It occurred not above a year ago, at East Grinstead, on an indictment for burglary, before Mr. Justice Ashurst, where I was myself counsel for the prisoner. It was clear upon the evidence that he had broken into the house by force in the night, but I contended that it appeared from proof, that he had broken and entered with an intent to rescue his goods, which had been seized that

day by the officers of excise; which rescue, though a capital felony by modern statute, was but a trespass, *temp. Henry VIII.* and consequently not a burglary.

Mr. Justice Ashurst saved this point of law, which the twelve Judges afterwards determined for the prisoner; but, in order to create the point of law, it was necessary that the prisoner's intention should be ascertained as a fact; and for this purpose, the learned Judge directed the Jury to tell him, with what intention they found that the prisoner broke and entered the house, which they did by answering, "To rescue his goods;" which verdict was recorded.

In the same manner, in the case of the King against Pierce, at the Old Bailey, the intention was found by the Jury as a fact in the special verdict. The prisoner having hired a horse and afterwards sold him, was indicted for felony; but the Judges doubting whether it was more than a fraud, unless he originally hired him intending to sell him, recommended it to the Jury to find a special verdict, comprehending their judgment of his intention, from the evidence. Here the quality of the act depended on the intention, which intention it was held to be the exclusive province of the Jury to determine, before the Judges could give the act any legal denomination.

My Lord, I am ashamed to have cited so many authorities to establish the first elements of the law, but it has been my fate to find them disputed. The

whole mistake arises from confounding criminal with civil cases. If a printer's servant, without his master's consent or privity, inserts a slanderous article against me in his newspaper, I ought not in justice to indict him; and if I do, the Jury *on such proof* should acquit him; but it is no defence to an action, for he is responsible to me *civiliter* for the damage which I have sustained from the newspaper, which is his property.—Is there any thing new in this principle? so far from it, that every student knows it as applicable to all other cases; but people are resolved, from some fatality or other, to distort every principle of law into nonsense, when they come to apply it to printing; as if none of the rules and maxims which regulate all the transactions of society had any reference to it.

If a man rising in his sleep, walks into a china-shop, and breaks every thing about him; his being asleep is a complete answer to an *indictment* for a trespass; but he must answer in an *action* for every thing he has broken.

If the proprietor of the York coach, though asleep in his bed at that city, has a drunken servant on the box at London, who drives over my leg and breaks it, he is responsible to me in damages for the accident; but I cannot indict him as the criminal author of my misfortune.—What distinction can be more obvious and simple?

Let us only then extend these principles, which were never disputed in other criminal cases, to the

crime of publishing a libel; and let us at the same time allow to the Jury, as our forefathers did before us, the same jurisdiction in that instance, which we agree in rejoicing to allow them in all others, and the system of English law will be wise, harmonious, and complete.

My Lord, I have now finished my argument, having answered the several objections to my five original propositions, and established them by all the principles and authorities which appear to me to apply, or to be necessary for their support. In this process I have been unavoidably led into a length not more inconvenient to the Court than to myself, and have been obliged to question several judgments, which had been before questioned and confirmed.

They however who may be disposed to censure me for the zeal which has animated me in this cause, will at least, I hope, have the candour to give me credit for the sincerity of my intentions:—it is surely not my interest to stir opposition to the decided authorities of the Court in which I practise: with a seat here within the bar, at my time of life, and looking no farther than myself, I should have been contented with the law as I found it, and have considered *how little* might be said with decency, rather than *how much*;—but feeling as I have ever done upon the subject, it was impossible I should act otherwise. It was the first command and counsel to my youth, always to do what my conscience told me to be my duty, and to leave the consequences to God.

I shall carry with me the memory, and, I hope, the practice, of this parental lesson to the grave: I have hitherto followed it, and have no reason to complain that the adherence to it has been even a temporal sacrifice;—I have found it, on the contrary, the road to prosperity and wealth, and shall point it out as such to my children. It is impossible in this country to hurt an honest man; but even if it were possible, I should little deserve that title, if I could, upon any principle, have consented to tamper or temporize with a question, which involves in its determination and its consequences, the liberty of the press;—and in that liberty, the very existence of every part of the public freedom.

SUBJECT

OF THE

TRIAL OF THE DEAN OF ST. ASAPH.

BEFORE we go on to the final proceeding in this memorable cause, viz. the application to arrest the judgment, on the ground, that the Dialogue, as set forth in the indictment, did not contain the legal charge of a libel, it may be necessary to insert the judgment delivered by Lord Mansfield on discharging the rule for a new trial;—a judgment which was supported by the rest of the Court, and which confirmed throughout the whole doctrine of Mr. Justice Buller, as delivered upon the trial at Shrewsbury.

It was too late in the day, when the Counsel finished, for the Judges to deliver their opinions, and the Court immediately adjourned; the Lord Chief Justice declaring, that "they were agreed in the "judgment they were to give, and would deliver it "the next morning."

Accordingly, next day, the 16th of November, at the opening of the Court, the Earl of Mansfield, Lord Chief Justice, delivered himself as follows:

IN this case of the King against Dr. Shipley, Dean of St. Asaph, the motion to set aside the verdict, and to grant a new trial, upon account of

the misdirection of the Judge, supposes that upon this verdict (either as a general, or as minutes of a special verdict to be reduced into form), judgment may be given :—for if the verdict was defective, and omitted finding any thing within the province of the Jury to find, there ought to be a *venire de novo,* and consequently this motion is totally improper ; therefore, as I said, the motion supposes that judgment may be given upon the verdict ; and it rests upon the objections to the direction of the Judge.

I think they may be reduced to four in number, one of which is peculiar to this case, and therefore I begin with it, *viz. That the Judge did not leave the evidence of a lawful excuse or justification to the Jury, as a ground for them to acquit the Defendant upon, or as a matter for their consideration.* This is an objection peculiar to this case, and therefore I begin with it, to dispose of it first. Circumstances merely of alleviation or aggravation are irrelevant upon the trial ; they are totally immaterial to the verdict, because they do not prevent or conclude the Jury's finding for or against the Defendant : they may be made use of when judgment is given, to increase or lessen the punishment, but they are totally irrelevant and immaterial upon the trial. Circumstances which amount to a lawful excuse or a justification, are proper upon the trial, and can only be used there. Upon every such defence set up, of a lawful excuse or justification, there necessarily arise

two questions, one of law, the other of fact; the first to be decided by the Court, the second by the Jury.

Whether the fact alleged, supposing it true, be a legal excuse, is a question of law; whether the allegation be true, is a question of fact; and, according to this distinction, the Judge ought to direct, and the Jury ought to follow the direction; though by means of a general verdict they are entrusted with a power of blending law and fact, and following the prejudices of their affections or passions.

The first circumstance in evidence in this cause is a letter of the 24th of January to Edwards, and the advertisement that accompanied it; and what was said by Edward Jones in the conversation that he held with the Defendant on the 7th of January. Upon this part of the case we must suppose the paper seditious or criminal; for, if it is neither seditious nor criminal, the Defendant must be acquitted upon the face of the record. Therefore, whether it is an excuse or not, we must suppose the paper to be a libel, or criminal in the eyes of the law. Then how does it stand upon this excuse? why, the Defendant, knowing the paper had been strongly objected to as tending to sedition, or that it might be so understood, publishes it with an advertisement*, avowing and justifying the doctrine: so that he pub-

* For the advertisement prefixed to the Dialogue, vide supra, page 138.

lishes it under the circumstances of avowing and justifying this criminal doctrine.

The next circumstance is from the evidence of Edward Jones, that the Defendant was told and knew that the paper was objected to as having a seditious tendency; that it might do mischief if it was translated into Welsh, and therefore that design was laid aside; that he read it at the county meeting, and said he read it *with a rope about his neck*; and, after he had read it, he said, *it was not so bad*. And this he knew upon the 7th January; yet he sets this up as an excuse for ordering it to be printed upon the 24th of January.

We are all of opinion clearly, that if the writing be criminal, these circumstances are aggravations, and by no means ought to have been left to the Jury as any excuse.

It is a mockery to say it is any excuse. What! when the man himself knows that he reads it *with a rope about his neck*; when he says, admitting it to be bad, that it is not *so bad*; when he has told a company of gentlemen, that for fear of its doing mischief to their country, he would not have it translated into Welsh:—all these circumstances plainly showed him that he should not have published it. Therefore we are all of opinion, it is the same as if no such evidence had been given, and that, if it had been offered by way of excuse, it ought not to have been received. The advertisement was read to the Jury, but the Judge did very right not to leave it

to them as a matter of excuse, because it was clearly of a contrary tendency.

What was meant by saying the advertisement should have been set out in the indictment, I do not comprehend; much less that blasphemy may be charged on the Scripture by only stating half the sentence.

If any part of the sentence qualifies what is set forth, it may be given in evidence, as was expressly determined by the Court so long ago as the case of the King and Bere, in Salkeld 417, in the reign of King William. Every circumstance which tends to prove the meaning, is every day given in evidence, and the Jury are the only judges of the meaning, and must find the meaning; for if they do not find the meaning, the verdict is not complete. So far for the objection upon that part which is peculiar to this case.

The second objection is, that the Judge did not give his own opinion, whether the writing was a libel, or seditious, or criminal.

The third, that the Judge told the Jury they ought to leave that question upon record to the Court, if they had no doubt of the meaning and publication.

The fourth and last, that he did not leave the Defendant's intent to the Jury.

The answer to these three objections is, that by the constitution the Jury ought not to decide the question of law, whether such a writing, of such a

meaning, published without a lawful excuse, be criminal; and they cannot decide it *finally* against the Defendant, because, after the verdict, it remains open upon the record; therefore it is the duty of the Judge to advise the Jury to separate the question of fact from the question of law; and, as they ought not to decide the law, and the question remains entire upon the record, the Judge is not called upon necessarily to tell them his own opinion. It is almost peculiar to the form of the prosecution for a libel, that the question of law remains entirely for the Court *upon record*, and that the Jury cannot decide it against the Defendant; so that a general verdict "that the Defendant is guilty," is equivalent to a special verdict in other cases. It finds all which belongs to the Jury to find; it finds nothing as to the question of law. Therefore when a Jury have been satisfied as to every fact within their province to find, they have been advised to find the Defendant *guilty*, and in that shape they take the opinion of the Court upon the law. No case has been cited of a special verdict in a prosecution for a libel, leaving the question of law upon the record to the Court, though, to be sure, it might be left in that form; but the other is simpler and better.

As to the last objection upon the *intent:* A criminal intent, from doing a thing criminal in itself without a lawful excuse, is an inference of law, and a conclusive inference of law, not to be contradicted but by an excuse, which I have fully gone through.

Where an *innocent act* is made criminal, when done with a particular intent, there the intent is a *material* fact to constitute the crime. This is the answer that is given to these three last objections to the direction of the Judge. The first I said was peculiar to this case.

The subject matter of these three objections has arisen upon every trial for a libel since the Revolution, which is now near one hundred years ago. In every reign there have been many such trials both of a private and a public nature. In every reign there have been several defended with all the acrimony of party animosity, and a spirit ready to contest every point, and to admit nothing. During all this time, as far as it can be traced, one may venture to say, that the direction of every Judge has been consonant to the doctrine of Mr. Justice Buller; and no counsel has complained of it by any application to the Court. The Counsel for the Crown, to remove the prejudices of a Jury, and to satisfy the by-standers, have expatiated upon the enormity of the libels; Judges, with the same view, have sometimes done the same thing; both have done it wisely, with another view—to obviate the captivating harangues of the Defendant's counsel to the Jury, tending to shew that they can or ought to find that in law the paper is no libel.

But the formal direction of every Judge (under which every lawyer for near one hundred years, has so far acquiesced as not to complain of it to the

Court) seems to me, ever since the Revolution, to have been agreeable to the direction of Mr. Justice Buller. It is difficult to cite cases; the trials are not printed. Unless particular questions arise, notes are not taken: nobody takes a note of a direction of course not disputed. We must, as in all cases of tradition, trace backwards, and presume, from the usage which is remembered, that the precedent usage was the same. We know there were many trials for libels in the reign of King William; there is no trace that I know of, of any report, that at al bears upon the question during that reign, but the case of the King and Bere, which is in Salkeld; that was in the reign of King William, and the only thing there applicable to the present question is, that the Court were of opinion that the writing complained of must be set out *according to the tenour*: Why? That the Court may judge of the very words themselves; whereas, if it was to be *according to the effect*, that judgment must be left to the Jury. But there it was determined, and under that authority ever since, the writing complained of is set out according to the tenour.

During the reign of Queen Anne we know several trials were had for libels, but the only one cited is in the year 1704; and there the direction (though Lord Holt, who is said to have done it in several cases, goes into the enormity of the libel) to the Jury was, "If you find *the publication* in "London, you must find the Defendant guilty."

Thus it stands, as to all that can be found precisely and particularly, in the reigns of King William and Queen Anne. We know that in the reign of George I. there were several trials for libels, but I have seen no note or traces of them, nor any question concerning them. In the reign of King George II. there were others; but the first of which there is a note (for which I am obliged to Mr. Manley*), was in February 1729—the King and Clarke—which was tried before Lord C. J. Raymond; and there he lays it down expressly (there being no question about an excuse, or about the meaning), he lays it down, *the fact of printing and publishing only is in issue.*

The *Craftsman* was a celebrated party-paper, wrote in opposition to the ministry of Sir Robert Walpole, by many men of high rank and great talents: the whole party espoused it. It was thought proper to prosecute the famous *Hague* letter. I was present at the trial, it was in the year 1731. It happens to be printed in the State Trials. There was a great concourse of people; it was a matter of great expectation, and many persons of high rank were present to countenance the Defendant. Mr. Fazakerly and Mr. Bootle (afterwards Sir Thomas Bootle) were the leading counsel for the Defendant. They started every objection and laboured every point. When the Judge over-ruled them, he usually said, "If I,

* One of the counsel for the prosecution in this cause.

" am wrong, you know where to apply." The Judge was my Lord Raymond, C. J. who had been eminent at the bar in the reign of Queen Anne, had been Solicitor and Attorney General in the reign of George I. and was intimately connected with Sir Edward Northey, so that he must have known what the ancient practice had been. The case itself was of great expectation, as I have stated to you, and it was so blended with party passion, that it required his utmost attention; yet, when he came to sum up and direct the Jury, he does it as of course, just in the same manner as Mr. Justice Buller did, " that " there were three points for consideration: the fact " of publication; the meaning (those two for the " Jury); the question of law or criminality, for the " Court upon the record." Mr. Fazakerly and Mr. Bootle were, as we all know, able lawyers; they were connected in party with the writers of the *Craftsman*. They never thought of complaining to the Court of a misdirection: they would not say it was not law: they never did complain. It never was complained of, nor did any idea enter their heads, that it was not agreeable to law. Except that case in 1729 that is mentioned, and this, the trials for libels before my Lord Raymond are not printed, nor to be found in any notes. But, to be sure, his direction in all was to the same effect. I by accident (from memory only I speak now) recollect one where the *Craftsman* was acquitted; and I recollect it from a famous, witty, and ingenious ballad that was made

at the time by Mr. Pulteney; and though it is a ballad, I will cite the stanza I remember from it, because it will show you the idea of the able men in opposition, and the leaders of the popular party in those days. They had not an idea of assuming that the Jury had a right to determine upon a question of law, but they put it upon another and much better ground. The stanza I allude to is this:

> For Sir Philip* well knows
> That his *innuendos*
> Will serve him no longer
> In verse or in prose;
> For twelve honest men have decided the cause,
> Who are judges of fact, though not judges of laws.

It was the admission of the whole of that party: they put it right; they put it upon the *meaning* of the *innuendos*: upon *that* the Jury acquitted the Defendant; and they never put up a pretence of any other power, except when talking to the Jury themselves.

* Sir Philip Yorke, afterwards Lord Chancellor Hardwicke, then Attorney-General.

It appears by a pamphlet printed in 1754, that Lord Mansfield is mistaken. The verse runs thus:

> Sir Philip well knows,
> That his innuendo's
> Will serve him no longer in verse or in prose;
> For twelve honest men have determin'd the cause,
> Who are judges alike of the facts, and the laws.

There are no notes as I know of (and I think the Bar would have found them out upon this occasion, if there had been any that were material), there are no notes of the trials for libels before my Lord Hardwicke. I am sure there are none before Lord C. J. Lee till the year 1752, when the case of the King and Owen came on before him. This happens to be printed in the State Trials, though it is incorrect, but sufficient for the present purpose. I attended that trial as Solicitor-General Lord C. Justice Lee was the most scrupulous observer and follower of precedents, and he directed the Jury, *as of course*, in the same way Mr. Justice Buller has done.

When I was Attorney-General, I prosecuted some libels; one I remember from the condition and circumstances of the Defendant; he was found guilty. He was a common councilman of the city of London: and I remember another circumstance, it was the first conviction in the city of London that had been for 27 years. It was the case of the King and Nutt; and there he was convicted, under the very same direction, before Lord Chief Justice Ryder.

In the year 1756 I came into the office I now hold. Upon the first prosecution for a libel which stood in my paper, I think (but I am not sure), but I think it was the case of the King and Shebbeare, I made up my mind as to the direction I ought to give. I have uniformly given the same in all, almost in the same form of words. No counsel ever complained

of it to the Court. Upon every Defendant being brought up for judgment, I have always stated the direction I gave; and the Court has always assented to it. The defence of a *lawful excuse* never existed in any case before me; therefore I have told the Jury if they were satisfied with the evidence of the publication, and that the meanings of the *innuendos* were as stated, they ought to find the Defendant guilty; that the question of law was upon record for the judgment of the Court. This direction being *as of course*, and no question ever raised concerning it in Court (though I have had the misfortune to try many libels in very warm times, against Defendants most obstinately and factiously defended), yet the direction being *as of course*, and no objection made, it passed as of course, and there are no notes of what passed. In one case of the King and Woodfall, on account of a very different kind of question (but, upon account of another question), there happens to be a report, and there the direction I have stated, is adopted by the whole Court as right, and the doctrine of Mr. Justice Buller is laid down in express terms. Such a judicial practice in the precise point from the Revolution, as I think, down to the present day, is not to be shaken by arguments of general theory, or popular declamation. Every species of criminal prosecution has something peculiar in the mode of procedure; therefore general propositions, applied to all, tend only to complicate and embarrass the question. No deduction or conclusion

can be drawn from what a Jury *may* do, from the *form* of procedure, to what they *ought* to do upon the fundamental principles of the constitution and the reason of the thing, if they will act with integrity and good conscience.

The fundamental definition of trial by Jury depends upon a universal maxim that is without an exception. Though a definition or maxim in law, without an exception, it is said, is hardly to be found, yet this I take to be a maxim without an exception: *Ad quæstionem juris non respondent juratores; ad quæstionem facti non respondent judices.*

Where a question can be severed by the form of pleading, the distinction is preserved upon the face of the record, and the Jury cannot encroach upon the jurisdiction of the Court; where, by the form of pleading, the two questions are blended together, and cannot be separated upon the face of the record, the distinction is preserved by the honesty of the Jury. The constitution trusts, that, under the direction of a Judge, they will not usurp a jurisdiction which is not in their province. They do not know, and are not presumed to know the law; they are not sworn to decide the law; they are not required to decide the law. If it appears upon the record, they ought to leave it there, or they may find the facts subject to the opinion of the Court upon the law. But further, upon the reason of the thing, and the eternal principles of justice, the Jury ought not to assume the jurisdiction of the law. As I said

before, they do not know, and are not presumed to know any thing of the matter; they do not understand the language in which it is conceived, or the meaning of the terms. They have no rule to go by but their affections and wishes. It is said, if a man gives a *right* sentence upon hearing one side only, he is a wicked Judge, because he is right by chance only, and has neglected taking the proper method to be informed; so the Jury who usurp the judicature of law, though they happen to be right, are themselves wrong, because they are right by chance only, and have not taken the constitutional way of deciding the question. It is the duty of the Judge, in all cases of general justice, to tell the Jury how to do right, though they have it *in their power* to do wrong, which is a matter entirely between God and their own consciences.

To be free, is to live under a government by law. The *liberty of the press* consists in printing without any previous license, subject to the consequences of law. The *licentiousness* of the press is *Pandora*'s box, the source of every evil. Miserable is the condition of individuals, dangerous is the condition of the State, if there is no certain law, or, which is the same thing, no certain administration of law to protect individuals, or to guard the State.

Jealousy of leaving the law to the Court, as in other cases, so in the case of libels, is now, in the present state of things, puerile rant and declamation. The Judges are totally independent of the

ministers that may happen to be, and of the King himself. Their temptation is rather to the popularity of the day. But I agree with the observation cited by Mr. Cowper * from Mr. J. Forster, " that " a *popular* Judge is an odious and a pernicious " character."

The judgment of the Court is not final; in the last resort it may be reviewed in the House of Lords, where the opinion of all the Judges is taken.

In opposition to this, what is contended for? That the law shall be in every particular cause what any twelve men, who shall happen to be the Jury, shall be inclined to think, liable to no review, and subject to no control, under all the prejudices of the popular cry of the day, and under all the bias of interest in this town, where thousands, more or less, are concerned in the publication of newspapers, paragraphs and pamphlets. Under such an administration of law, no man could tell, no counsel could advise, whether a paper was or was not punishable.

I am glad that I am not bound to subscribe to such an absurdity, such a solecism in politics; but that, agreeable to the *uniform* judicial practice since the Revolution, warranted by the fundamental principles of the constitution, of the trial by Jury, and upon the reason and fitness of the thing, we are

* One for the counsel for the prosecution.

all of opinion that this motion should be rejected, and the rule discharged*.

* Although the Court was unanimous in discharging the rule, Mr. Justice Willes, in delivering his opinion, sanctioned by his authority Mr. Erskine's argument, that upon a plea of Not guilty, or upon the general issue on an indictment or information for a libel, the Jury had not only the *power*, but a constitutional *right*, to examine, if they thought fit, the criminality or innocence of the paper charged as a libel; declaring it to be his settled opinion, that, notwithstanding the production of sufficient proof of the publication, the Jury might upon such examination acquit the Defendant generally, though in opposition to the directions of the Judge, without rendering themselves liable either to attaint, fine, or imprisonment, and that such verdict of deliverance could in no way be set aside by the Court.

SUBJECT

OF THE

TRIAL OF THE DEAN OF ST. ASAPH.

THIS judgment may be considered as most fortunate for the public, since, in consequence of the very general interest taken in this cause, the public mind was at last fully ripe for the Libel Bill; which was soon after moved in the House of Commons by Mr. Fox, and seconded by Mr. Erskine.

The venerable and learned Chief Justice undoubtedly established by his argument, that the doctrine so soon afterwards condemned by the unanimous sense of the Legislature when it passed the Libel Act, did not originate with himself; and that he only pronounced the law as he found it, established by a train of modern *decisions. But, supported as we now are by this judgment of Parliament, we must venture humbly to differ from so truly great an authority. The Libel Bill does not confer upon the Jury any jurisdiction over the law, inconsistent with the general principle of the constitution: but considering that the question of libel or no libel is frequently a question of fact rather than of law, and in many cases of fact and law almost inseparably blended together,—it directs the*

Judge, as in other cases, to deliver his opinion to the Jury upon the whole matter, including of course the question of libel or no libel, leaving them at the same time to found their verdicts upon such whole matter so brought before them as in all other criminal cases *.

* This act—viz. 32 Geo. III. c. 60, runs thus:

" Whereas doubts have arisen, whether, on the trial of an indict-
" ment or information for the making or publishing any libel,
" where an issue or issues are joined between the King and the
" Defendant or Defendants, on the plea of Not guilty pleaded,
" it be competent to the Jury impannelled to try the same to give
" their verdict upon the whole matter in issue: Be it therefore
" declared and enacted, by, &c. That on every such trial the Jury
" sworn to try the issue, may give a general verdict of Guilty or
" Not guilty, upon the whole matter put to issue on such indict-
" ment or information;—and shall not be required or directed
" by the Court or Judge, before whom such indictment or in-
" formation shall be tried, to find the Defendant or Defendants
" guilty, merely on the proof of the publication by such Defend-
" ant or Defendants of the paper charged to be a libel, and of
" the sense ascribed to the same in such indictment or inform-
" ation.

" II. Provided always, that on every such trial, the Court or
" Judge before whom such indictment or information shall be
" tried, shall, according to their or his discretion, give their or his
" opinion or directions to the Jury on the matter in issue between
" the King and the Defendant or Defendants in like manner as in
" all other criminal cases.

" III. Provided also, that nothing herein shall extend, or be
" construed to extend, to prevent the Jury finding a special ver-
" dict at their discretion, as in other criminal cases.

" IV. Provided also, that in case the Jury find the Defendant
" or Defendants guilty, it shall and may be lawful for the said
" Defendant or Defendants to move an arrest of judgment on

The best answer to the apprehensions of the great and eminent Chief Justice, regarding this course of proceeding, as then contended for by Mr. Erskine, and now established by the Libel Act, is the experience of seventeen years since that act passed.

Before the statute it was not difficult for the most abandoned and profligate libeller, guilty even of the most malignant slander upon private men, to connect his cause with the great privileges of the Jury, to protect innocence. Upon the Judge directing the Jury, according to the old system, to find a verdict of Guilty upon the fact of publication,—shutting out altogether from their consideration the quality of the matter published;—ingenious counsel used to seize that occasion to shelter a guilty individual under the mask of supporting great public right; and Juries, to show that they were not implicitly bound to find verdicts of Guilty upon such evidence alone, were too successfully incited to find improper verdicts of acquittal: but since the passing of the Libel Act, when the whole matter has been brought under their consideration,—when the quality of the matter published has been exposed when criminal, and defended when just or innocent, Juries have listened to the Judge with attention and reverence without being bound in their consciences (except in matters of abstract law), to fol-

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" such ground and in such manner as by law he or they might
" have done before the passing of this act;—any thing herein
" contained to the contrary notwithstanding."

low his opinion, and instead of that uncertainty anticipated by Lord Mansfield, the administration of justice has been in general most satisfactory, and the public authority been vindicated against unjust attacks with much greater security and more supported by public opinion, than when Juries were instruments in the hands of the fixed magistrates; whilst at the same time public liberty has been secured by leaving the whole matter in all public libels to the judgment and consideration of the people. This reformed state of the law, as it regards the liberty of the press, is now so universally acknowledged, that the highest magistrates have declared in the House of Lords that no new laws are necessary either to support the state, or protect the people.

The following argument in arrest of judgment is copied from a newspaper of the succeeding day.

MR. ERSKINE'S SPEECH

IN

ARREST OF JUDGMENT.

Mr. Erskine moved the Court to arrest the judgment in the case of the King against the Dean of St. Asaph upon two grounds: first, because even if the Indictment sufficiently charged a libel, the verdict given by the Jury was not sufficient to warrant the judgment of the Court; and secondly, because the Indictment did not contain any sufficient charge of a libel.

On the first objection, he again insisted on the right of the Jury to find a general verdict on the merit of the writing charged on the record as a libel, notwithstanding the late judgment of the Court;—and declared he should maintain it there, and every where else, as long as he lived, till the contrary should be settled by act of Parliament. He then argued at considerable length, that the verdict, as given by the Jury, was neither a general, nor a special verdict, and complained of the alteration made upon the record without the authority of the Court.

He said, that the only reason for his insisting on his first objection at such length, was the importance of the principle which it involved, and the danger of the precedent it established; although he was so certain of prevailing upon his second objection, that he considered it to be almost injustice to the Court to argue it. All who knew him in and out of the profession, could witness for him, that he had ever treated the idea of ultimately prevailing against him, upon such an indictment, to be perfectly ridiculous, and that his only object in all the trouble which he had given to the Court and to himself, in discussing the expediency of a new trial, was, to resist a precedent, which he originally thought and still continued to think was illegal and unjustifiable:—the warfare was safe for his Client, because he knew he could put an end to the prosecution any hour he pleased, by the objection he would now at last submit to the Court. It did not require the eye of a lawyer to see that even if the Dialogue, instead of being innocent and meritorious, as he thought it, had been the foulest libel ever composed or published; the Indictment was drawn in such a manner as to render judgment absolutely impossible. He said, that if he had been answering in his own person to the charge of publishing the Dialogue complained of, he should have rejected with scorn the protection of a deficient Indictment, would have boldly met the general question, and holding out defiance to the Prosecutor, would have

called upon his Counsel to show what sentence, or word, though wrested with all the force ingenuity could apply to confound grammar and distort language, could be tortured into a violation of any one principle of the government:—but that, standing as Counsel for another, he should not rest his defence even upon that strong foundation, but, after having maintained as he had done at the trial, the innocence, or rather the merit of the Dialogue, should entrench himself behind every objection which the forms of law enabled him to cast up.

The second objection was, that the Indictment did not contain a sufficient charge of a libel of and concerning the King and his government:—that though the Court, by judging of libels of that nature, invested itself with a very large discretion; yet it, nevertheless, was a discretion capable of being measured by very intelligible rules of law, and within which rules he was persuaded the Court would strictly confine itself.

The first was, that the Court, in judging of the libellous or seditious nature of the paper in question, could only collect it from the Indictment itself, and could supply nothing from any extrinsic source; and that, therefore, whatever circumstances were necessary to constitute the crime imputed, could not be supplied from any report of the evidence nor from any inference from the verdict, but must be set out upon the record.

That rule was founded in great wisdom, and formed

the boundary between the provinces of the Jury and the Court; because, if any extrinsic circumstances, independent of the plain and ordinary meaning of the writing, were necessary to explain it, and point its criminal application; those facts must be put upon the record, for three reasons:

First, that the charge might contain such a description of the crime, that the Defendant might know, what crime he was called upon to answer.

Secondly, that the application of the writing to those circumstances which constituted its criminality might be submitted as facts to the Jury, who were the sole judges of any meaning, which depended upon extrinsic proof.

Thirdly, that the Court might see such a definite crime, that they might apply the punishment which the law inflicted.

He admitted, that wherever a writing was expressed in such clear and unambiguous words as in itself to constitute a libel, without the help of any explanation, all averments and innuendos were unnecessary;—and therefore, if it could be established that the pamphlet in question, if taken off the dusty shelves of a library, and looked at in the pure abstract, without attention to times or circumstances, without application to any facts not upon record, and without any light cast upon it from without, contained false, pernicious, illegal, and unconstitutional doctrines, in their tendency destructive of the government, it would unquestionably be a libel. But

if the terms of the writing were general, and the criminality imputed to it consisted in criminal allusions or references to matter dehors the writing; then, although every man who reads such a writing might put the same construction on it; yet when it was the charge of a crime, and the party was liable to be punished for it, there wanted something more.

It ought to receive a juridical sense on the record, and, as the facts were to be decided by the Jury, they only could decide whether the application of general expressions, or terms of reference, or allusions, as the case might be, to matters extrinsic, was just, nor could the general expressions themselves be extended, even by the Jury, beyond their ordinary meaning, without an averment to give them cognizance of such extended import;—nor could the Court, even after a verdict of Guilty, without such averment infer any thing from the finding, but must pronounce strictly according to the just and grammatical sense of the language on the record. The Court, by declaring libel or not libel, to be a question of law, must be supposed by that declaration not to assume any jurisdiction over facts, which was the province of the Jury; but, only to determine that, if the words of the writing without averment, or with averments found to be true by the Jury, contained criminal matter, it would be pronounced to be a libel according to the rules of law:—whereas, if the libel could only be inferred from its application to something extrinsic, however reasonable or

probable such application might be,—no Court could possibly make it for want of the averment, without which the Jury could have no jurisdiction over the facts extrinsic, by reference to which only the writing became criminal.

The next question was, how the application of the writing to any particular object was to be made upon the record: that was likewise settled in the case of the King and Horne.

"In all cases those facts which are descriptive of "the charge must be introduced on the record by "averments, in opposition to argument and infer-"ence."

He said, that where facts were necessary in order to apply the matter of the libel to them, it was done introductorily. And where no new fact was necessary, but only ambiguous words were to be explained, it was done by the innuendo. But that the innuendo could not in itself enlarge the matter which it was employed to explain, without an antecedent introduction to refer to; but coupled with such introductory matter it could.

He said, nothing remained but to apply those unquestionable principles to the present Indictment, and that application divided itself into two heads:

First, whether the words of the Dialogue, considered purely in the abstract, without being taken to be a seditious exhortation addressed to the people, in consequence of the present state of the nation, as connected with the subject matter of it, could

possibly be considered to be a libel on the King and his government.

Secondly, whether, if such reference or allusion was necessary to render it criminal, there were sufficient averments on the record to enable the Court to make the criminal application of otherwise innocent doctrines consistently with the rules of law.

He said, he should therefore take the Dialogue, and show the Court that the whole scope and every particular part of it were meritorious.

Here Lord Mansfield said to Mr. Erskine, that having laid down his principles of judgment, the Counsel for the prosecution should point out the parts they insisted on as sufficiently charged to be libellous, and that he would be heard in reply. On which Mr. Bearcroft, Mr. Cowper, Mr. Leicester, and Mr. Bower, were all heard; and endeavoured with great ingenuity to show that the Dialogue was on the face of it a libel: but on Mr. Erskine's rising to reply, the Court said, they would not give him any further trouble, as they were unanimously of opinion, that the Indictment was defective, and that the judgment should be arrested.

The Court went upon the principles of the case of the King against Horne, cited by Mr. Erskine; saying there were no averments to point the application of the paper as a libel on the King and his government; and the Dean is therefore finally discharged from the prosecution.

Mr. Justice Willes threw out, that if the Indict-

ment had been properly drawn, it might have been supported. But Lord Mansfield and Mr. Justice Buller did not give any such opinion, confining themselves strictly to the question before the Court.

The judgment was accordingly arrested, and no new proceedings were ever had upon the subject against the Dean or the printer employed by him. His adversaries were, it is believed, sufficiently disposed to distress him; but they were probably aware of the consequences of bringing the doctrines maintained by the Court of King's Bench into a second public examination.

END OF THE FIRST VOLUME.

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